CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 246.

WILLIAM CRAWFORD, APPELLANT,

vs.

WILLIAM L. RUBBELL, AS TREASURER OF THE ADAMS EXPRESS COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED APRIL 8, 1903.

(17,345.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 17, 1899.

1 United States Circuit Court of Appeals, Second Circuit.

Present: The Honorable William J. Wallace, the Honorable Nathaniel Shipman.

WILLIAM CRAWFORD, Complainant, Appellant,
vs.
WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company, Defendant, Appellee.

Certification of Questions to the Supreme Court under the Act of March 3, 1891.

This cause came before this court on February 2, 1899, upon an appeal taken by the complainant to review a decree of the circuit court, southern district of New York, sitting in equity. Such decree dismissed the bill. As to a question of law arising upon said appeal this court desires the instruction of the Supreme Court for its proper decision.

Statement of Facts.

This suit is for an injunction to restrain the express company from refusing to accept express packages from complainant for transportation, except upon the condition that complainant either pay for or provide the war-revenue stamp required to be affixed to each receipt in addition to its usual and ordinary charges for transportation as the same existed on and for a long time prior to July 1st, 1898. The defendant company since July 1st, 1898, has
2 fixed rates of compensation which it offers to accept for services rendered by it, whereby, in addition to the amount of its charges as the same existed on and for a long time prior to July 1st, 1898, it requires the shipper either to provide or pay for the cost of the stamp on the bill of lading or receipt required to be issued by the act of Congress of June 13, 1898, known as the "war-revenue act." It has made known these charges to shippers, and particularly to complainant, and refuses to accept packages for transportation except upon payment thereof. The pleadings are annexed to this certificate.

Questions Certified.

Upon the facts set forth, the questions of law concerning which this court desires the instruction of the Supreme Court for its proper decision are:

(1.) Does the war-revenue act of June 13, 1898, impose upon the carrier exclusively the tax represented by the stamp to be affixed to each bill of lading, manifest, or other evidence of receipt required to be issued to each shipper of goods accepted by the carrier for transportation, or does it impose the tax merely upon the trans-

action of shipment, leaving it to be paid indifferently by either party thereto?

(2.) If the war-revenue act of June 13, 1898, does impose such tax exclusively upon the carrier, does it preclude the carrier, who is by such act required to issue to each shipper a bill of lading, manifest, or other evidence of receipt, from relieving itself of the expense of affixing and cancelling the stamp required to be attached to such bill of lading, manifest, or other evidence of receipt?

3 In accordance with the provisions of section 6 of the act of March 3, 1891, establishing courts of appeal, etc., the foregoing questions of law are by the circuit court of appeals hereby certified to the Supreme Court.

WM. J. WALLACE,
U. S. Circuit Judge.
N. SHIPMAN,
U. S. Circuit Judge.

4 Supreme Court, County of New York.

WILLIAM CRAWFORD, Plaintiff,
against
WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company, Defendant. } Complaint.

The above-named plaintiff, by Dill, Seymour & Kellogg, its attorneys, complaining of the defendant, respectfully shows to the court:

I. That at all times hereinafter mentioned the above-named plaintiff was and is a retail merchant in the city of New York, carrying on said business as the sole surviving partner of the firm of Simpson, Crawford & Simpson, and under said firm name, and plaintiff has duly complied with all the requirements of law to entitle him to do business under said firm name.

II. That the said Adams Express Company at all the said times was and is an unincorporated association or joint stock company, consisting of seven or more persons, carrying on business in the city and State of New York, and elsewhere in the United States, and that the said association has and has had a president and treasurer; that the above-named defendant, William L. Hubbell, is the treasurer of the said Adams Express Company.

III. That the said Adams Express Company is now and
5 has been for many years last past engaged in the business of transporting and forwarding express packages between points located within the State of New York and those located within other States of the United States and between points located within such other States, as a common carrier, and that during the said time it has continuously held itself out to the public as an interstate and intrastate common carrier of express packages in the manner aforesaid.

IV. That in the course of its business as such common carrier, it has entered into contracts with various railroad companies having

terminals in the city of New York and elsewhere, whereby it has acquired the right to transport and forward such express packages over the lines of such railroads.

V. That the said Adams Express Company, among its other contracts, has entered into an arrangement or contract with the New York, New Haven and Hartford Railroad Company, whereby it has acquired exclusive right to forward and transport express packages over the lines of the said railroad between New York and Danbury, Connecticut, and that the said Adams Express Company is the only company or concern engaged in the business of forwarding and transporting express packages between New York and Danbury, either over the lines of the said New York, New Haven and Hartford railroad or over any other lines of railroad.

VI. That the business conducted by the said Adams Express Company at the times herein mentioned was and is of a public nature, involving the use of public highways, streets and franchises, and that the said Adams Express Company was and is a common carrier, and subject to all legal responsibilities as such.

6 VII. That heretofore and prior to the first day of July, 1888, the said Adams Express Company had established fixed and regular rates and charges for the forwarding and transportation of goods and chattels between New York and Danbury, and that the rate thus established and charged for packages of twenty pounds or under in weight and of a value less than $50, between New York and Danbury aforesaid, was thirty-five cents per package. That the said Adams Express Company, prior to the said time, had advertised and held itself out as willing and ready to forward and transport express packages of the said weight and value from New York to Danbury upon payment in advance to it by the shipper of the sum of thirty-five cents.

VIII. That at all the times mentioned herein, and for many years last past, the above-named plaintiff was and is carrying on the said business of retail merchant in the city of New York and elsewhere, with his principal office and place of business in the city, county and State of New York.

That from the nature of and in the course of his business, he is and has been, during said period, compelled to ship large quantities of goods to various parts of the United States by express, and that it has been and is of great importance to this plaintiff that such shipments should go by express and not by freight or otherwise, and that they should be promptly delivered at their places of destination under safeguard against loss such as express companies employ, and should be forwarded or transported at reasonable prices and charges. That the competition between plaintiff and his rivals in business in such that in the event of any inability to forward goods by express, as aforesaid, he would be subjected to great detriment and disadvantage and most seriously injured in his business.

That among the places to which plaintiff is frequently compelled to thus ship goods by express is Danbury, Connecticut, above

7 mentioned, and that the only express company forwarding or transporting goods between New York and said Danbury is the said Adams Express Company.

That the said plaintiff has also made very large express shipments for many years last past over the lines of the Adams Express Company to other places upon the said lines, and has likewise shipped very largely over the lines of other express companies carrying goods from New York to other localities. That the average number of express shipments heretofore made by the plaintiff over all of the said express lines from the city of New York has not been less than 2,500 per month, and for the month of June, 1898, was twenty-nine hundred and seventy-six, and that the average number of shipments heretofore made by the plaintiff over the lines of the Adams Express Company has not been less than seven hundred shipments per month, and for the month of June, 1898, was seven hundred and sixty-nine. That the plaintiff's business has been and is growing and extending, and that the aggregate number of shipments which the plaintiff will hereafter be required to make in the regular and ordinary course of its business over the lines of the said Adams Express Company and of the other express companies having terminals in New York, will not be less than the amount of shipments in the past.

IX. That on the 15th day of August, 1898, the above-named plaintiff, in the regular course of his business, offered and tendered to the said Adams Express Company at its office in the city of New York, a parcel of merchandise and requested the shipment, forwarding and transportation thereof to said Danbury, Connecticut, which is located on the line of the said New York, New Haven and Hartford railroad. That the said parcel was of the kind and nature which the said Adams Express Company has heretofore held itself out and is now holding itself out as being willing and ready
8 to transport by express as a common carrier, was properly prepared for transportation, and the same was in weight less than twenty pounds, and in value was less than $50. That the said package was duly labeled and addressed to Messrs. Quinn & Scott, at said Danbury. That the said Quinn & Scott are and for a long time past have been regular customers of the plaintiff and doing business with and making purchases from the plaintiff, and that the contents of said package *was* so tendered for transportation as aforesaid, pursuant to a *bona fide* order therefor received by the plaintiff from the said Quinn & Scott. That said parcel or package was in all respects as to size, contents, wrapper, address and all other particulars, in strict conformity with the rules, regulations and requirements of the said Adams Express Company. That the plaintiff at the time of said tender of the said parcel, likewise tendered in legal tender money of the United States to the said Adams Express Company, the sum of thirty-five cents for the transportation thereof, and that the sum thus tendered was the amount of the charge or rate as established by the said Adams Express Company for such transportation prior to July 1, 1898.

X. That the said Adams Express Company refused to accept said package for shipment or transportation unless the plaintiff should pay in advance to the Adams Express Company the price or value of the stamp required by the act of Congress approved June 13,

1898, and entitled "An act to provide ways and means to meet war expenditures, and for other purposes," or furnish such stamp to be attached and canceled to the bill of lading, manifest, or other evidence of receipt or forwarding required by said act, to be issued by all express companies and common carriers to shippers or consignors.

Said Adams Express Company has stated to the plaintiff that it has raised and increased its rates as the same existed prior
9 to July 1, 1898, for the forwarding or transportation of such packages by adding thereto the amount or value of the said internal-revenue stamp required by law to be placed upon such bill of lading or receipt, for the purpose of reimbursing itself for the amount of such tax imposed by said act.

That upon the tender of the package for forwarding and transportation as aforesaid said Adams Express Company then and there refused to accept said package for forwarding or transportation unless the plaintiff should himself before the issue by the said Adams Express Company of any bill of lading or receipt therefore, attach to said bill of lading or receipt the stamp required by said act, or should pay in advance to the Adams Express Company the price or value of the stamp to be affixed thereto by said company.

XI. That the said Adams Express Company has further stated to plaintiff that it would accept no parcels, packages, bundles, boxes or bales for transportation by express to said Danbury or to any other point upon its lines, unless the shipper or consignor paid to it the price or value of the said stamp required to be attached and canceled to the said bill of lading or furnished the same, in addition to the amount of its rates as established prior to July 1, 1898, and has stated that it had raised or increased its rates for forwarding and transportation to all points reached by its system, by adding to all such rates as established prior to July 1, 1898, the price or value of the said revenue stamp, and that in the future they would not accept for shipment, forwarding or transportation from any shipper or consignor, any bundle, bale, package or parcel or article unless such shipper or consignor paid them the price or value of the said stamp in addition to the said rate established prior to July first, 1898.

XII. That thereupon the plaintiff refused to pay the
10 amount of the said stamp, and demanded of the said Adams Express Company that they accept the said package for transportation upon receipt of the rate tendered by the plaintiff, and inquired of the said Adams Express Company whether it had any other ground for its refusal to accept said package other than the non-payment of the said tax. That the said Adams Express Company still persisted in its refusal to accept said package for transportation, and stated that it had no other reason for its refusal than the refusal of the plaintiff to pay the amount of the said tax.

That the said plaintiff was unable to compel the said Adams Express Company to receive the said package, and that the same was not accepted or received by it.

XIII. That the said Adams Express Company as above stated is

the only company or concern carrying on the business of a common carrier of express packages between New York and said Danbury, and that by reason of the foregoing refusal and action it became impossible for the plaintiff to send the said package by express to said Quinn & Scott.

XIV. That the action taken by the Adams Express Company with regard to the requiring the shipper or consignor to pay the amount of the said tax has been also taken by the American Express Company, the United States Express Company, the Wells-Fargo Express Company and by all or nearly all of the express companies having terminals in the city of New York, and that all of the said express companies have refused and are refusing to accept for transportation any bundles, bales, packages, parcels or things, except upon the condition that the shipper or consignor furnish and pay to such express companies the amount or value of the said war-revenue stamp, in addition to the rates or charges for transportation as established by such express companies prior to July 1, 1898.

11 That by reason of said action on the part of all the said express companies, all or nearly all of the shippers of express packages in the city of New York, and a very large number in other parts of the United States, are prevented from shipping goods by express, except upon the payment of the tax aforesaid.

XV. Upon information and belief, that the said action on the part of the said Adams Express Company and the other express companies, in compelling the plaintiff and other shippers to pay the amount of the said tax, is unreasonable and unlawful and in violation of the statutes of the United States in such cases made and provided.

XVI. That by reason of the very large number of packages which plaintiff is required, in the ordinary course of its business to ship by express, the plaintiff will be subjected, unless relief is afforded by this court, to the necessity of bringing a very large number of suits for the recovery from time to time of such moneys as he may pay under protest, pursuant to the imposition of the said tax, and that the said necessity will result in a multiplicity of suits which would be disastrous in the highest degree to the plaintiff's rights, and would cause an excessive and inordinate expense, and would interfere most seriously with plaintiff's business and occupation, for all of which no adequate remedy would exist at law.

That by reason of the action of the Adams Express Company, as above stated, the said plaintiff will be hindered and delayed in the transportation of its goods by express, and its business and occupation will be otherwise interfered with, largely to its damage, and that the exact amount of such damage is wholly incapable of accurate compensation, and that the plaintiff will have no adequate remedy therefor at law.

12 XVII. That in the determination of the said question, not only the rights of the plaintiff, but of all other shippers of express packages in the city and State of New York and throughout the entire United States of America are likewise involved, and

that the interests of the said shippers with regard to the foregoing are identical with those of the plaintiff, and that to enforce said interests, unless relief be granted and the matter disposed of by injunction, a great multiplicity of suits will be required, to the excessive damage of such shippers and consignors, and for which no adequate remedy will otherwise exist.

Wherefore, the plaintiff demands judgment against the defendant and against the Adams Express Company, its agents, employees and servants, that they and each of them be enjoined, restrained and prohibited from refusing to accept and receive for forwarding and transportation, the said package tendered for forwarding and transportation, as set forth in the complaint upon the prepayment or offer to prepay the regular and established charges of such forwarding and transportation, to wit, the sum of thirty-five cents.

That they and each of them be enjoined, restrained and prohibited from refusing to accept and receive for forwarding and transportation and from refusing to forward and transport any other package or packages of the kind and character which the said Adams Express Company is accustomed to forward and transport, and of the kind and character of which the said Adams Express Company holds itself out to the public as a common carrier, when the offer or tender of such package shall be accompanied by the prepayment or offer to prepay the regular and established charges of the said Adams Express Company for such forwarding and transportation, exclusive of the United States revenue stamp required by said act of Congress approved June 13, 1898, to be affixed to the bill
13 of lading, manifest or other evidence of receipt and forwarding, and exclusive of the price, cost or value of such stamp.

That they and each of them be enjoined, restrained and prohibited from requiring of the plaintiff as a condition of forwarding and transporting a package or packages for the plaintiff that the plaintiff directly or indirectly furnish or pay for the United States revenue stamp required by said act to be affixed to the bill of lading, manifest or other evidence of receipt and forwarding.

That they and each of them be enjoined, restrained and prohibited from requiring of the plaintiff or any of its consignees as a condition of the forwarding and transportation and delivery of any package that the plaintiff or such consignee directly or indirectly furnish or pay for the United States revenue stamp required by such act to be affixed to the bill of lading, manifest or other evidence of receipt and forwarding.

That they and each of them be enjoined and required to accept and receive for forwarding and transportation and to forward and transport for the plaintiff any package or packages of the kind and character they are accustomed to forward and transport, and of the kind and character of which they hold themselves out to the public as common carriers, at the regular rates established by them prior to the first day of July, 1898, and without requiring from the plaintiff that he furnish or pay for the United States revenue stamp required by said act to be affixed to the bill of lading, manifest or other evidence of receipt and forwarding.

That they and each of them be enjoined, restrained and prohibited from requiring of the plaintiff as a condition of the plaintiff's employing the Adams Express Company as a common carrier that the plaintiff or its consignees, directly or indirectly, furnish or pay for the United States revenue stamp or stamps required by said act to be affixed to the bill of ladings, manifest or other evidence
14 of receipt and forwarding, either as a separate and distinct charge for forwarding and transportation or by way of an increased rate for such forwarding and transportation.

That pending the determination of this action a temporary order and injunction to the effect aforesaid be issued.

That plaintiff have such further other order or relief as may be equitable and just.

That the plaintiff recover from the defendant the costs and disbursements of this action.

DILL, SEYMOUR & KELLOGG,
Plaintiff's Attorneys, 27 Pine Street, New York City.

BOROUGH OF MANHATTAN, *City and County of New York,* } *ss:*

William Crawford, being duly sworn, says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WILLIAM CRAWFORD.

Sworn to before me this 17th day of August, 1898.
JOHN J. RANAGAN,
Commissioner of Deeds, Borough of Manhattan, City of New York.

(Endorsed:) U. S. circuit court. Filed Jan. 16, 1899. John A. Shields, clerk.

15 Circuit Court of the United States for the Southern District of New York.

WILLIAM CRAWFORD, Plaintiff,
against
WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company, Defendant. } Answer.

And now comes the above-named defendant, by Seward, Guthrie & Steele, his attorneys, and answers the complaint of the plaintiff above named, upon information and belief, as follows:

I. This defendant admits the allegations contained in the first paragraph or subdivision of said complaint.

II. This defendant admits the allegations contained in the second paragraph or subdivision of the said complaint.

III. This defendant admits the allegations contained in the third paragraph or subdivision of said complaint.

IV. In answer to the allegations contained in the fourth paragraph of the complaint, this defendant admits that the Adams Express Company, in the course of its business as a common carrier, entered into contracts with various railroad companies having terminals in the city of New York and elsewhere, whereby
16 it has acquired the right to forward express packages over the lines of such railroads; but this defendant says that the actual transportation over the lines of said railroads is performed by the railroad companies, respectively, and denies that said Express Company transports any packages over said railroads in any other sense than above set forth.

V. This defendant admits the allegations contained in the fifth paragraph or subdivision of said complaint, except that he denies that under its arrangement or contract with the New York, New Haven and Hartford Railroad Company said express company has acquired any right to transport express packages over the lines of said railroad, and alleges that the actual transportation of express packages over said lines is performed by the railroad company.

VI. Answering the allegations contained in the sixth paragraph or subdivision of said complaint, this defendant denies that the business conducted by the Adams Express Company, at the times mentioned in said complaint, or at any time, involve the use of public highways, streets or franchises, or that the same was of a public nature in any other sense than that the business of a common carrier, as the same is or may be carried on by individuals, is, by reason of its consisting of the rendition of services to the public, a business of a public nature.

VII. Answering the allegations contained in the seventh paragraph or subdivision of said complaint, this defendant denies that prior to July 1, 1898, the Adams Express Company had established fixed and regular rates and charges for the forwarding and transportation of goods and chattels between New York and Danbury, or that the rate thus established and charged for packages of twenty pounds and under in weight, and of a value less than fifty
17 dollars, between New York and Danbury aforesaid, was thirty-five cents per package, and this defendant denies that the Adams Express Company, prior to the said time, had advertised and held itself out as willing and ready to forward and transport express packages of the said weight and value, from New York to Danbury, upon payment in advance to it by the shipper of the sum of thirty-five cents; but this defendant admits that for some time prior to July 1, 1898, the Adams Express Company did demand and receive from the public for the forwarding of express matter between New York and Danbury regular and reasonable rates and charges by way of its compensation for the service, and that the usual, regular and reasonable rate thus demanded and received by it for express packages of twenty pounds or under in weight, and of a value less than fifty dollars, between New York and Danbury aforesaid, was, and for a long time had been, thirty-five cents per

package, and he admits that the Adams Express Company, prior to July 1, 1898, had held itself out as willing and ready to forward express packages of the said weight and value from New York to Danbury, upon payment in advance to it by the shipper of a reasonable compensation for the service, and that thirty-five cents was, prior to July 1, 1898, such reasonable compensation.

VIII. This defendant admits the allegations contained in the eighth paragraph or subdivision of said complaint.

IX. This defendant admits the allegations contained in the ninth paragraph or subdivision of said complaint, except that he denies that the sum of thirty-five cents tendered by the plaintiff, as therein alleged, was the amount of any charge or rate established by the Adams Express Company for such transportation prior to July 1, 1898; but he admits that the same was, prior to July 1, 1898,
18 the reasonable and usual charge demanded and received by it for such service.

X. Answering the allegations contained in the tenth paragraph or subdivision of said complaint, this defendant admits that the Adams Express Company refused to accept for shipment or transportation the package referred to in the complaint unless the plaintiff should pay in advance to the express company the price or value of the stamp required by the act of Congress, approved June 13, 1898, and entitled, "An act to provide ways and means to meet war expenditures, and for other purposes," or furnish such stamp to be attached to the bill of lading, manifest or other evidence of the receipt or forwarding of the package required by the said act of Congress to be issued by all express companies or common carriers to shippers or consignors. This defendant denies that the Adams Express Company has stated to the plaintiff that it has raised or increased its rates as the same existed prior to July 1, 1898, for the forwarding or transportation of such packages by adding thereto the amount or value of the said internal-revenue stamp required by law to be placed upon such bill of lading or receipt for the purpose of reimbursing itself for the amount of such tax imposed by said act; and this defendant alleges that the Adams Express Company stated to the plaintiff that from and after July 1, 1898, all its rates were quoted plus the amount of the stamp required by said act to be affixed to the bill of lading or receipt for goods accepted by the Adams Express Company for transportation. This defendant admits that upon the tender of the said package for forwarding and transportation as aforesaid, the Adams Express Company then and there refused to accept said package for forwarding or transportation unless the plaintiff should himself, before the issue by the Adams Express Company of any bill of lading or receipt therefor, furnish the stamp required by said act to be attached thereto,
19 or should pay in advance to the Adams Express Company the price or value of the same to be affixed thereto by said company, but this defendant denies that the Adams Express Company then and there refused to accept said package for forwarding or transportation unless the plaintiff should himself, before the issue by the Adams Express Company of any bill of lading or receipt

therefor, attach to said bill of lading or receipt the stamp required by said act.

XI. Answering the allegations contained in the eleventh paragraph or subdivision of said complaint, this defendant admits that the Adams Express Company stated to the plaintiff that it would accept no parcels, packages, bundles, boxes or bales for transportation by express to said Danbury, or to any other point upon its lines, unless the shipper or consignor paid to it the price or value of the said stamp required to be attached and canceled to the said bill of lading, or himself furnish such stamp, in addition to the amount of the usual and reasonable rates which it was accustomed to demand and receive for such service prior to July 1, 1898. But this defendant denies that the Adams Express Company stated that it had raised or increased its rates for forwarding and transporting to all points reached by its system by adding to all such rates as alleged to have been established prior to July 1, 1898, the price or value of the said revenue stamp, or that in the future the Adams Express Company would not accept for shipment, forwarding or transportation from any shipper or consignor any bundle, bale, package or parcel or article unless such shipper or consignor paid to the Adams Express Company the price or value of the said stamp in addition to the said rate alleged to have been established prior to July 1, 1898. And, on the contrary thereof, this defendant alleges that the said The Adams Express Company stated to the plaintiff that, from and after July 1, 1898, all its rates should be quoted plus the amount of the stamp required by said war-
20 revenue act, to be affixed to the bill of lading or receipt for goods accepted by the Adams Express Company for transportation.

XII. Answering the allegations contained in the twelfth paragraph or subdivision of said complaint, this defendant admits that thereupon the plaintiff refused to pay the amount of the said stamp, and demanded of the Adams Express Company that it accept the said package for transportation upon receipt of the rate tendered by the plaintiff, and inquired of the Adams Express Company whether it had any other ground for its refusal to accept said package other than the non-payment of the said tax, and he admits that the Adams Express Company still persisted in its refusal to accept said package for transportation, but he denies that it stated that it had no other reason for its refusal than the refusal of the plaintiff to pay the amount of the said tax, and avers that it stated to the said plaintiff that from and after July 1, 1898, all its rates for express service were quoted plus the amount of the stamp required by said act of Congress to be affixed to the bill of lading or receipt issued therefor, and that the reason for its refusal to accept said package was the refusal of the plaintiff either to furnish a stamp himself, such as required by said act, or to pay the amount of such stamp to be affixed by the Adams Express Company in addition to the charge of thirty-five cents which the said express company had been in the habit of demanding and receiving as its usual and reasonable charge for such services prior to July 1, 1898. This de-

fendant further admits that the said plaintiff was unable to compel the Adams Express Company to receive the said package, and that the same was not accepted or received by it.

XIII. Answering the allegations contained in the thirteenth paragraph or subdivision of said complaint, this defendant admits that the Adams Enpress Company, as in said complaint stated, is the only company or concern carrying on the business of a
21 common carrier of express packages between New York and Danbury, but he denies that by reason of the foregoing refusal and action on the part of the Adams Express Company it became impossible for the plaintiff to send the said package by express to said Danbury, for this defendant says that the Adams Express Company expressed to the said plaintiff its entire willingness to receive said package and forward the same to Danbury upon the receipt of that which had been, prior to July 1, 1898, its usual and regular charge for such service, provided the plaintiff would either himself furnish the said stamp required by said war-revenue act to be attached and canceled to the bill of lading or receipt for such package, or would pay to the Adams Express Company the amount or value of said stamp.

XIV. This defendant, on information and belief, admits the allegations contained in the fourteenth paragraph or subdivision of said complaint, except that he denies that all of the said express companies therein mentioned have refused and are refusing to accept for transportation any bundles, bales, packages, parcels or things, except upon the condition that the shipper or consignor furnish and pay to such express companies the amount or value of said war-revenue stamp in addition to the rates or charges for transportation, as alleged to have been established by such express companies prior to July 1, 1898. But this defendant admits that all the said express companies have refused and are refusing to accept for transportation any bundles, bales, packages, parcels or things, except upon condition that the shipper or consignor shall either furnish the stamp required by the said war-revenue act to be attached and canceled to the bill of lading or receipt issued therefor, or pay to such express companies the amount or value of said stamp in addition to the reasonable rates or charges which said express com-
22 panies were accustomed to demand and receive for such service prior to July 1, 1898.

XV. This defendant denies the allegations contained in the fifteenth paragraph or subdivision of said complaint, and denies that the said action on the part of the Adams Express Company in relation to said tax is unreasonable or unlawful or in violation of any statute of the United States.

XVI. Answering the allegations contained in the sixteenth paragraph or subdivision of said complaint, while this defendant denies that the said plaintiff is entitled to any relief in this action, or that his rights have in anywise been violated or infringed by any action on the part of the Adams Express Company, and while he alleges that the dealings of the Adams Express Company, in relation to the said tax are lawful and reasonable, yet this defendant admits if such

dealings were unreasonable and unlawful the plaintiff would, unless relief were afforded by this court, be subjected to the necessity of bringing a very large number of suits for the recovery, from time to time, of such moneys as he might pay under protest in relation to such tax, and that such necessity would result in a multiplicity of suits which would be injurious to the plaintiff's rights and would cause an excessive and inordinate expense, and would interfere most seriously with the plaintiff's business and occupation, and that if the said dealings of the Adams Express Company in relation to the said tax are unreasonable and unlawful the plaintiff has no adequate remedy at law therefor.

XVII. This defendant, further answering, on information and belief alleges that, as this defendant and the Adams Express Company are advised and believe, the provisions of the said act of Congress did not and do not impose any tax upon the business
23 or property of express companies or other carriers, but that it was and is the intention and effect of the said act to impose a tax upon the transactions of shipment of express packages, and to leave it to be determined by agreement of the parties or by the ordinary customs of business or trade whether the cost thereof should be defrayed by the shipper or consignor on the one hand, or by the express company or other carrier on the other hand; and this defendant avers that while under the said act of Congress it is the duty of the Adams Express Company to issue a bill of lading or receipt to every shipper from whom goods are accepted for transportation, and while a stamp must be affixed to such bill of lading and properly canceled, under and by the provisions of section 6 of said act, and other provisions thereof, the tax itself is provided to be paid either by the carrier who issues the bill of lading or receipt, or by the shipper or consignor for whose use or benefit the same is issued, thus leaving it to be determined by agreement of the parties or by the ordinary customs of trade, upon which party to the transaction the tax shall ultimately fall; and this defendant alleges that, as he is advised by counsel and verily believes, even if said war-revenue act by its terms imposes the said tax upon the business of the Adams Express Company, nevertheless said express company may lawfully collect the amount of said tax from its shippers in addition to the usual rates or charges which it was accustomed to demand and receive and which were just and reasonable prior to the imposition of said tax; and that the amount of its said usual and reasonable rates as the same were demanded and received by it prior to July 1, 1898, plus the amount of said tax, would be a fair and reasonable charge or rate for the services rendered by said express company in receiving, forwarding, and delivering such shipments after July 1, 1898; and this defendant avers that the Adams Express Company may lawfully require its shippers to pay the amount of such
24 tax in addition to its rates or charges as the same were demanded and received prior to July 1, 1898.

And the defendant, therefore, avers that, whatever may be the construction put upon said war-revenue act with reference to the matters and things in said complaint and herein set forth, the action

of the Adams Express Company in requiring the plaintiff and other shippers of express packages over its lines either to furnish the stamps required to be affixed and canceled to the bills of lading or receipts issued for such packages accepted by it for transportation, or to pay the Adams Express Company the amount thereof, was and is reasonable, just and lawful; and, if the value of the said stamp which the Adams Express Company required the plaintiff either to furnish or to pay for as a condition of accepting the said package for transportation should be deemed a part of the rate or charge demanded by the Adams Express Company for the service to be performed for the plaintiff in receiving, forwarding and delivering said package, that such rate or charge, including the value of such stamp, was and is just, reasonable and lawful.

Wherefore, the defendant prays that the complaint may be dismissed, with costs.

SEWARD, GUTHRIE & STEELE,
Solicitors for the Defendant,
40 *Wall Street, New York City.*

STATE OF NEW YORK, }
City and County of New York, } ss:

Charles Steele, being duly sworn, doth depose and say: That he is a member of the firm of Seward, Guthrie & Steele, attorneys for the above-named defendant William L. Hubbell; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to
25 those matters he believes it to be true. That the reason why this verification is not made by the said defendant is that the said defendant is not within the city, county or State of New York. That deponent is also secretary of the Adams Express Company, and that the sources of deponent's knowledge and information in regard to the statements contained in the foregoing petition are his familiarity with and knowledge of the affairs of said The Adams Express Company, by reason of his position of secretary thereof, and also statements made to him by the president of said The Adams Express Company, and an inspection of the various papers and records of the company in connection therewith.

CHARLES STEELE.

Sworn to before me this 26th day of September, 1898.

CHAS. J. DODD,
[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

26 UNITED STATES OF AMERICA, }
Second Circuit, } ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit—

Do hereby certify that the foregoing certificate in the cause entitled William Crawford, complainant, appellant, against William L.

Hubbell, as treasurer of the Adams Express Company, defendant, appellee, was duly filed and entered of record in my office, by order of said court, on the 7th day of February, 1899, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of New York, this 3rd day of March, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, cancelled 2, 9, '99. W. P.]

27 [Endorsed:] United States circuit court of appeals, second circuit. Wm. Crawford, complainant, appellant, *vs.* Wm. L. Hubbell, as treasurer of Adams Express Co. Certificate. United States circuit court of appeals, second circuit. Filed Mar. 1, 1899. William Parkin, clerk.

Endorsed on cover: Certificate. File No., 17,345. U. S. C. C. of appeals, 2nd circuit. Term No., 248. William Crawford, appellant, *vs.* William L. Hubbell, as treasurer of the Adams Express Company. Filed April 3rd, 1899.

No. 248.

Brief of Dill & McDermott for Ap

Filed Oct. 9, 1899.

SUPREME COURT OF THE UNITED STATES

Office Supreme Court U. S.
FILED
OCT 9 1899
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1899

William Crawford
Appellant

against

William L. Hubbell, Treasurer of the Adams Express Company
Appellee

No. 248

BRIEF FOR APPELLANT

DILL, SEYMOUR & BALDWIN
Solicitors for Appellant

FREDERICK R. KELLOGG and JAMES B. DILL
ALLAN L. McDERMOTT
Of Counsel for Appellant

EVENING POST JOB PRINTING HOUSE, NEW YORK.

Supreme Court of the United States.

WILLIAM CRAWFORD, Appellant, AGAINST WILLIAM M. HUBBELL, treasurer of the Adams Express Company, Appellee.	17,345. October Term, 1899. No. 248.

BRIEF FOR APPELLANT.

Statement of Facts.

This cause comes before this Court upon a certificate of the United States Circuit Court of Appeals in and for the Second Circuit, whereby the instruction of this Court is desired upon certain questions of law.

I.—NATURE OF THE ACTION. The action is brought by the appellant for an injunction restraining the Adams Express Company, represented in this proceeding by the above named appellee, its treasurer, from refusing to accept express packages from the appellant for transportation over its lines except upon the condition that the appellant either pay for or provide the War Revenue stamp required to be affixed to each receipt in addition to its usual and

ordinary charges for transportation, as the same existed on and for a long time prior to July 1, 1898.

It is a test case, the appellant representing the Merchants' Association of New York, composed of a large number of the leading express shippers of that city, and the appellee representing the interests of all the express companies having terminals in that city.

II.—NATURE OF THE DEFENSE. This is based upon two grounds:

FIRST.—That the War Revenue tax was not intended by Congress to be imposed exclusively upon the express company, even in the first instance, but that it is placed simply upon the transaction of shipment, to be paid indifferently by either party thereto; and

SECOND.—That even if the express company is compelled exclusively by the statute to pay the tax in the first instance, yet it is left free to relieve itself of this expense by refusing to accept express packages for transportation unless the shippers agree to assume the burden.

III.—THE ESSENTIAL FACTS INVOLVED are uncontradicted, and are briefly as follows:

1. That the Adams Express Company (hereinafter called the Company) for many years past has been engaged in business as a common carrier of express packages between the City of New York and other places located within the said State and other States of the Union, including Danbury, Connecticut (fols. 5, 15).

2. That among other contracts, the Company has entered into an arrangement with the New York, New Haven and Hartford Railroad Company whereby it acquired, prior to the dates involved herein, the

exclusive right to forward express packages over the lines of the said railroad between New York and Danbury, Connecticut, and that at said times the Company was the only concern engaged in that business between New York and Danbury (fols. 5, 16).

3. That prior to July 1, 1898, the usual and regular rate demanded by the Company for the forwarding of express packages of twenty pounds or under in weight, and of a value less than fifty dollars, between New York and Danbury, was thirty-five cents a package (fols. 6, 17).

4. That in August, 1898, the appellant was a large retail merchant in New York City and a large shipper of express packages out of the City of New York over the lines of the Company and those of other similar concerns (fols. 7, 17).

5. That on August 15, 1898, the appellant tendered the Company in New York a properly prepared parcel of the weight and kind above mentioned, to be forwarded from New York to Danbury, and at the same time duly tendered the usual and regular sum of thirty-five cents for such services (fols. 7, 8, 17).

6. That the Company refused to accept the said parcel unless the appellant should pay, in addition to the said sum of thirty-five cents, the price or value of the War Revenue stamp, or should furnish such stamp (fols. 8, 18).

7. That since July 1, 1898, the Company has refused and refuses to accept packages for transportation to any points upon its lines, except upon payment not only of the amount of its charges as they existed on and for a long time prior to July 1, 1898, but also of the cost of the War Revenue stamp (fols. 2, 18, 19).

8. That the Company, however, does not claim to have technically raised its rates of transportation, but takes the position that its *rates* (technically so called) remain as before, and that it is entitled to transfer the burden of the tax directly upon the shipper by quoting those rates, plus the tax, as two separate items (fols. 19, 20, 21).

9. That the appellant refused to pay the amount of the stamp demanded, as aforesaid, and was unable to compel the Company to receive the package, and that the same was not accepted or received by the Company.

10. That all, or nearly all, of the express companies having terminals in the City of New York have taken precisely the same position as that of the Adams Express Company (fols. 10, 21),

11. That the appellant has no adequate remedy at law in case the act complained of is held to be illegal (fols. 11, 22).

12. That the question is one of great importance, not only to the appellant and the company, but to every shipper of express matter and to every express company in the United States (fol. 12).

IV.—THE PROCEEDINGS BELOW. The cause first came on to be heard before Mr. Justice Lacombe of the Circuit Court, was dismissed by him upon the hearing and without taking briefs. In so doing the learned Justice took pains to state that he did so, not from mature conviction as to the appellant's lack of equity, but solely as a matter of first impression, and for the purpose of facilitating a hearing on the appeal at the earliest possible date.

An appeal was thereupon taken to the United States Circuit Court of Appeals in and for the Second Circuit. As a result of this appeal, the following questions were certified to this Court:

(1.) Does the War Revenue Act of June 13, 1898, impose upon the carrier exclusively the tax represented by the stamp to be affixed to each bill of lading, manifest, or other evidence of receipt required to be issued to each shipper of goods accepted by the carrier for transportation, or does it impose the tax merely upon the transaction of the shipment, leaving it to be paid indifferently by either party thereto?

(2.) If the War Revenue Act of June 13, 1898, does impose such tax exclusively upon the carrier, does it preclude the carrier, who is by such act required to issue to each shipper a bill of lading, manifest or other evidence of receipt, from relieving itself of the expense of affixing and canceling the stamp required to be attached to such bill of lading, manifest or other evidence of receipt (fol. 2).

These points we will now consider.

POINT I.

The tax in question is imposed exclusively upon the business of transportation and is intended to be borne by the carrier in all cases where it accepts goods for transportation.

In the arguments below our opponents have attempted to treat this point as one of minor importance, claiming, to use their own words, that

> "Even had the act in express terms, imposed the tax upon the express company, the company might still properly and lawfully require its reimbursement by shippers as a condition of accepting goods for transportation. * * * The discussion as to the proper interpretation of the act becomes therefore purely academic."

Their position is, that whatever be the meaning of the law, the carrier may refuse to accept goods tendered unless the shipper agrees to pay the tax.

But the meaning of the statute appears to us to be the point of primary importance in this case.

For a common carrier, unlike a private individual, is not free to act or not, as he may choose. He is under an absolute duty to carry, and cannot evade or modify this duty by unlawful or unreasonable restrictions or conditions.

The question that it is therefore necessary to decide is whether the condition adopted by the carrier requiring the payment of the tax by the shipper, is or is not unlawful or unreasonable.

And this depends upon the intention of Congress as to who shall bear the tax when the common law duty to accept (which is not affected by the revenue law) has been performed by the carrier.

For if it was not the intention of Congress that the carrier should pay the tax, then clearly it is justified in refusing to carry goods unless the shipper does so.

But, if on the other hand, the legislative intent was that the tax should fall, not upon the citizen, but upon the carrier, then it is, as we shall attempt to show, unreasonable and unlawful for the carrier to refuse to comply with its common law duty to accept, save upon the condition that an unwilling shipper shall permit it to escape from the statutory burden.

What, therefore, is the intent?

The language of the act is as follows:

> "EXPRESS AND FREIGHT: It shall be the duty of *every* railroad or steamboat company, carrier, *Express Company*, or corporation or person whose occupation is to act as such, *to issue* to the shipper or consignor, or his agent, or person *from whom any goods are accepted* for transportation, *a bill of lading*, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and

transportation, whether in bulk or in boxes, bales, packages, bundles, or not so enclosed or included, *and there shall be duly attached* and cancelled, as in this act provided, *to each of said bills of lading*, manifests, or other memorandum, and to each duplicate thereof, *a stamp* of the value of one cent; PROVIDED, that one bill of lading shall be required on bundles or packages of newspapers when enclosed in one general bundle at the time of shipment. *Any failure to issue such bill of lading*, manifest, or other memorandum, as herein provided, shall *subject such railroad* or steamboat company, carrier, *Express Company*, or corporation, or person *to a penalty* of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

By Section 7 of the same statute it is provided that if any person shall make, sign or issue any paper, &c., without the same being duly stamped, such person is guilty of a misdemeanor and subject to a fine.

By Section 13 of the same act it is provided that any person who shall issue or cause to be issued any paper, &c., without the same being duly stamped, and with intent to evade the statute, shall be punished by fine or imprisonment.

THE CONTENTION OF THE APPELLANT is that it was the intent of Congress in these sections not merely to raise a certain amount of revenue from a stamp duty upon bills of lading, but that the revenue thus contributed should not come from the shippers of goods, but from the carriers themselves.

In other words, *the appellant contends that this particular tax was intended to be a tax upon transportation* which was to be borne by the companies or concerns engaged in the business of transportation, which was imposed upon this particular busi-

ness in view of its public or *quasi* public nature and privileges, and which was not intended to be placed as an additional burden upon the shoulders of private individuals.

THE APPELLEE'S CONTENTION, on the other hand, is that the provision of the statute above alluded to had no reference to the ultimate distribution of the burden of the tax; that the only intent of Congress was to raise a certain amount of revenue from whomsoever it might be; that the only reason for the rigorous penalties imposed by the act upon the carrier was to make it certain that the carriers would act (to quote from their brief below) as "tax collectors for the Government," and that their responsibility stopped at this point, leaving them free to compel the shipper to bear the burdon, if they saw fit.

Hence, the carriers claim that it is open to them to either compel the shipper to furnish the stamp to the company, who will then affix it, or to pay the price of the stamp furnished and affixed by the company.

In other words, they say that the tax was not intended to be one upon the business of transportation, but was simply a general tax to be computed in the particular manner indicated, the burden of which might fall upon any person who could be compelled to bear it by the operation of the commercial laws to supply and demand.

The first question then to be decided is as to whether this tax is a mere general and floating tax or whether it was intended to be laid upon the business of transportation.

Upon this point we submit the following considerations:

(*A.*) *In the levy of taxation, it is the duty and presumed intention of the Government to consider not merely the question of the raising of revenue,*

but the question of distribution of the burden of taxation.

The position taken by the appellee is, that the War Revenue Act must be interpreted solely in the light of the necessity on the part of the Government to obtain sufficient revenue for its maintenance, and that this having been secured, it is immaterial to the Government by whom the amount of the tax is paid.

This proposition, which lies almost at the foundation of the argument of our opponents, is, it is submitted, not well founded.

For, it is clearly recognized that in all civilized tax legislation, *not merely the needs of the Government, but the needs of the citizen are to be considered and presumably have been considered.*

> "In revenue taxes, other considerations are to be kept in view; the question being always not exclusively how a certain sum of money can be collected for public expenditure, *but how, when and upon what subjects it is wise and politic to levy the necessary taxes under the existing circumstances, having regard not merely to the replenishing of the public treasury, but to the general benefit and welfare of the political society,* and taking notice, therefore, of the manner in which the levy and collecting of the tax will affect the several interests in the State. * * *"
>
> Cooley on Taxation, p. 11.
>
> Story on the Constitution, Sec. 965.

> "The Congress of the United States may determine whether the tax upon the goods sold shall be borne or paid by the seller or buyer. *It is within the power of the Legislature to determine not only which party shall pay the amount of the tax to the Government, but upon whom the burden shall finally rest,* and also, for greater convenience in the collection of the tax, to provide that the amount of the tax shall be paid by one party to the Government and recovered back from the

other party, or deducted upon the final settlement with him. * * *"

Ammidown vs. *Freeland*, 101 Mass., 303.

"If the words of the law seem to be of relatively doubtful import, it may then, perhaps, become necessary to look beyond them in order to ascertain what was in the legislative mind at the time the law was enacted; what the circumstances were under which the action was taken; what evil, if any, was meant to be restrained; what was the leading object of the law, and what the supporting and secondary object. * * * We are therefore at liberty to suppose that the two main objects had in view in the framing of the provisions of any tax law were, first, the providing for the public revenue, and second, the securing of the individuals against extortion under governmental proceedings to collect the revenue."

Cooley on Taxation, pp. 264-5.

These authorities establish—

(1.) That in the interpretation of any particular tax legistation, we must keep in mind throughout the existence not merely of the one, but of the other, object of the Government, and must seek to ascertain the intent of the legislators as to both of these points.

(2.) That if the statute contains no express provisions upon these points, we must seek this intent by an examination of the inferences to be drawn from the act and from all the surrounding circumstances.

(3.) That the power of the Government is of so broad and sweeping a nature as to leave it free to prescribe where this burden shall rest.

What, therefore, was the intent of Congress in this regard?

In answering this inquiry we will examine

(*B.*) *The statute itself.*

(*C.*) *The similar statutes of* 1862, 1863 *and* 1864 *upon which the present act is modeled.*

(*B.*) *The intent to place the burden of this tax upon the transportatiom business appears affirmatively from the act.*

The following points are to be noted:

1. *A positive duty is imposed upon the carrier to issue a bill of lading* or a receipt *whenever goods are accepted* for transportation. "It shall be the duty of every * * * express company, etc. * * * to issue, etc. * * *."

2. "*There shall be duly attached and cancelled as in this act provided, to each of said bills of lading*" (to wit, bills of lading thus required to be issued)—the stamp specified.

3. *And it is clear that this stamp must be affixed before and not after the issuance.* For by paragraphs 7 and 13, if the bill were issued without a stamp the carrier would be subject to various penalties. The entire statute is so framed that when an instrument is required to be stamped, the stamp must be affixed before issue. And no presumptions to the contrary will be indulged in unless by virtue of express language to that effect.

The same construction was applied to the former stamp act.

In construing the Act of 1866, Commissioner of Internal Revenue Rollins says:

> "*It is the duty of the maker of an instrument to affix the stamp thereto, and to cancel the same in the manner required by law.*"
>
> 4 Int. Rev. Rec., p. 61.
>
> 4 Int. Rev. Rec., p. 164.

That the execution of the receipt includes as a necessary act to execution the affixing and cancellation of the stamp appears from the opinion of the Supreme Court of Illinois in *Latham* v. *Smith*, 45 Ill., 25, p. 26.

Speaking of the Stamp, the Court says:

> "If necessary, the note was as incomplete (without the stamp) as if it had lacked the maker's signature, and the attaching and cancelling it without authority would be as unauthorized as writing the maker's name to the instrument without authority. If that is important, it is the last act *essential to its validity, and is as much of the act of the maker as is the signature.*"

To the same effect is *Myers* v. *Smith*, 48 Barb. (N. Y.), 614, p. 636.

Since, then, the act requires the *Express Company* to issue the receipt, and that a stamp should be affixed thereto and canceled, the duty of affixing the stamp and of canceling it is as much essential to and a part of its issuance as the signature to it.

4. *In other words, the law requires the issue of a completed and valid bill of lading for all goods accepted.* It requires that the bill shall be complete before it is issued. It requires as one of the elements necessary to a completed bill that it should have the stamp annexed. It places this stamp on precisely the same footing as the paper, the ink, the signature, the clerical labor, and all of the other elements which necessarily go to make up a legal instrument of this nature.

5. *And from this it follows that the cost of furnishing this stamp is placed by the act upon the same party who necessarily bears the cost of all of the other elements above referred to, i. e., the carrier.*

The duty to issue is imposed upon the carrier and upon it alone, *in all cases where it accepts the goods for transportation.* We will discuss later its right to refuse to thus accept. But if, as a matter of fact, it has accepted, this absolute obligation is imposed upon it.

And the duty to issue includes the duty of preparing the document to be issued.

The duty to prepare this document includes the duty to provide and furnish all the materials and things necessary for its completion in its final form.

No other conclusions can be drawn from the law save by a forced and distorted construction.

6. *Further emphasis is placed upon this construction of these provisions by comparing them with the other clauses of Schedule A.*

The schedule in question specifies a large number of instruments upon which stamps are required, such as bills, charter parties, conveyances, &c., &c. *But in the great majority of these instances there is no duty imposed of any nature whatsoever.*

Thus it is left to the option of the parties to a commercial transaction as to whether bills of exchange, promissory notes, &c., shall be executed. There is no compulsion attempted to be placed upon any such individuals requiring them to cause such documents to come into existence.

In the present case, however, together with two other instances, we find this positive duty to prepare a document and issue a document, imposed.

And we find that Congress deemed not only that in this instance an absolute obligation to issue should exist, but also that this obligation should be imposed upon one particular party to the transaction and should not be left open and uncertain.

No duty whatsoever is imposed upon the shipper.

He is not required to demand a bill of lading. He is not required to cause one to be issued. He is not required to stamp any bill of lading which is issued,

He is not required to see that any bill of lading which may be issued has a stamp affixed. He is not prohibited from shipping goods unless such a stamped bill of lading is issued.

Why should this be so if Congress had intended to leave an open question as to the party by whom the burden of complying with this obligation in all its details was to be borne?

It is clear from the comparison of this provision with those where the duty was clearly intended to be settled by agreement of the parties that Congress appreciated *in this instance* the imposition of a *definite obligation upon a definite party* and not the mere creation of an obligation, the ultimate resting-place of which was uncertain.

7. *Again, if any doubt can remain as to the location of the burden it disappears when we look at the penalties which are imposed.*

They are solely directed against the carrier and not against the shipper.

They are penalties not merely for failure to issue an instrument such as would have been a bill of lading before the act, *but for failure to issue the bill as required by the act.* The Government requirements are not met by the issue of an *unstamped* instrument. The penalty is principally directed against the failure to properly affix the stamp.

They are penalties for failure to *issue* and not for failure to *demand or receive* the document specified.

The contrast is clear between the clause now under discussion and other cases where a duty is intended to be imposed upon both parties to the transaction, as in paragraphs 10 and 11, where any person who accepts or pays a domestic or foreign bill of exchange, draft, &c., without its being stamped, is made equally guilty with the person who makes, issues or signs such a document.

And it is no answer to this argument to say that the sole object of this provision was to compel the

issue of a document in each case and thus prevent the evasion of the tax.

Such was, undoubtedly, *one* of the objects of Congress.

But such an answer wholly fails to explain why Congress, in carrying out its intent, imposed its penalties for failure to comply with the law *solely upon one party* to the transaction.

And the only explanation of this is that the legislative purpose was twofold: *first*, to cause the document to be actually issued; and, *second*, to place the duty of issuing it, in its completed and legal form, upon the carrier and not upon the shipper.

8. *The provision with regard to Pullman and sleeping car companies* - as to whom a specific declaration appears that they shall pay for the stamp —has been claimed by the defendants to show that Congress intended to draw a distinction between these companies and others engaged in transportation.

But, aside from the consideration that the Pullman clause was entirely new, and was inserted after the first draft of the law, whereas the Express paragraph was modeled upon the wording of the old law, as we shall show, thus giving rise to a natural difference of phraseology, *exactly the contrary inference is, we submit, the proper one.*

For it must be remembered that the weight of authority is that a sleeping car company is not a common carrier or subject to responsibilities as such.

See cases collated in 22 Am. & Eng. Enc. Law, 797.

Hence, if no specific provision concerning them had been made, there might have been uncertainty as to whether they were subject to the duties expressly and impliedly imposed upon common carriers by the other clause of the act; and to remove all doubt and to prevent any claim on their part that the burdens imposed upon carriers generally should

not be borne by them as well, this special provision was enacted.

Its aim, when correctly interpreted, was not to distinguish but to conform to the section now under discussion.

9. The foregoing conclusions are in no wise affected by the fact that there is no positive duty contained in the language of the statute compelling a carrier to "accept" goods for transportation.

In using the word "accept" the statute clearly refers to the common law obligations of the carrier, among which is the well recognized duty to accept goods tendered for transportation if the same be of the nature which they ordinarily transport, upon tender also of their lawful charges.

The effect of the section is not to exonerate them from their common law duty to accept, *but to leave that standing as it did before, to assume that it will be performed, and to add to it a further and additional duty,* to wit, that when they do accept, *as they are required to do at common law under the circumstances mentioned,* they must issue a bill of lading with a stamp annexed.

In other words, they not only must accept if the conditions are proper, but upon such acceptance they must issue the bill of lading with the stamp upon it.

10. *Nor is Section 6 of the statute antagonistic to our position.*

This section provides that:

> "On and after the first day of July, 1898, there shall be levied, collected and paid for and in respect to the several * * * documents * * * described in Schedule A * * * *by any person or persons or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued,* the several taxes or sums of money set down, &c."

It is claimed by the defendant that this language should be considered as having the effect of leaving open as between the parties to any and all of the transactions enumerated in Schedule A, including that of shipment by express, the question of who should pay the taxes imposed thereby.

This is not the true construction of the section.

The documents involved in Schedule A are of two classes—first, those concerning whose execution no duty is imposed, and second, a very limited number concerning which an absolute duty imposed upon a definite party exists.

As to the *first* of these classes, the construction contended for by the defendants may appropriately apply without resulting in any contradiction of provisions.

But as to the *second* class, it cannot apply without giving rise to a positive, clashing, and irreconcilable inconsistency. In other words, as to *these* instances, positive obligations placed upon a particular individual by language which, as we have shown, was clearly so intended, will be absolutely nullified by such an interpretation.

Such a result can only be justified by unavoidable necessity, in the light of the well settled rules requiring all parts of the same act to be construed harmoniously, if possible.

But no such necessity exists; for a perfectly harmonious and consistent result is reached, if we take the meaning of Section 5, when interpreted in the light of the various and different matters to which it refers, to be simply *that it requires the stamp to be affixed by one party or the other, as the respective requirements of the various items of Schedule A may make it necessary; or by either one, in cases where no requirement exists.*

Such is the only true, natural, rational and consistent interpretation of the clause.

And that it is the correct interpretation appears even more clearly by a reference to the original War Revenue Law of 1862.

For the section in question is taken bodily, with practically no change, from Section 94 of the Act of 1862, Chap. 119, and from Section 151 of the subsequent amendatory act, Laws of 1864, Chap. 173.

In the old law, as in the present, this general clause referred by its terms to all of the instances mentioned in Schedule A.

But in the Schedule A of the old act there was no provision imposing such a duty upon any person.

The items of the tax therein imposed were all of a nature where no element of public policy was involved as to the party by whom the tax should be borne.

The Express tax was not contained in that schedule.

Hence the meaning of the section in question under the law as it then stood could give rise to no inconsistency or controversy.

And when this section was taken bodily from the old act and incorporated into the new, it is to be assumed that the framers of the statute intended it to be used in the same sense as that which it had formely possessed, and as applicable to matters of the same nature as those to which it related in the old law, and that there was no intention that its meaning was to be unnecessarily distorted by, or to effect a distortion of, a new provision in the new law different from any which the old statute had contained.

11. *The previous decisions.* It is, in the next place, of interest to point out that the interpretation of the act for which we contend has so far received the sanction of many officers and tribunals before whom the point has come, although the greater part of these rulings are not yet embodied in books of reports.

The first of these authorities is the opinion of Assistant Attorney-General Boyd, rendered on or about July 12, 1898, in which he says:

> "The purpose of the law is clear; *it was to tax the carrier* and not the shipper, and these provisions undoubtedly fix upon the express companies and other carriers the duty of providing, affixing and cancelling the stamp; and their failure to so provide, affix and cancel such stamp subjects them to the penalties provided by law."

The next authority upon the point is the decision of United States Commissioner Hunter, rendered at Ottumwa, Iowa, on or about July 16, and holding clearly that the express company must pay the tax imposed by the act.

The matter was next considered by the Commissioner of Internal Revenue on or about August 12th. He reached precisely the same conclusion, and held, as appears from the reports of the decision which we have been able to obtain, that the duty of issuing a stamped bill of lading rested upon the express companies.

The same subject also received elaborate consideration by the Railroad Commission of Georgia in proceedings instituted against the Southern Express Company, to prevent it from attempting to compel its shippers to pay the amount of this tax.

The matter was argued at length by learned counsel, and was carefully considered by the Commissioners; and the decision rendered by them is an absolute and unequivocal holding to the effect that the intent of the War Revenue Act was to impose a tax upon the business of transportation, and not to levy a tax either upon the shipper directly, or of such a nature that it might be transferred to the shipper at the will of the carrier.

We call attention to the following brief extracts:

> "*The person expressly charged with the duty to issue the bill of lading is also impressed with the implied duty of providing the agencies and instrumentalities necessarily*

> *incidental to the performance of the duty expressly enjoined.* Since he is bound to issue a bill of lading and cannot issue it without its being first stamped, *the duty of stamping is necessarily incidental* to, and consequently included in, the duty to issue.
>
> * * * * *
>
> If it had been the intention of the Federal Congress to require of the carrier no more than the delivery to the consignor of the unstamped bill of lading, then the penalty for failure to stamp and cancel the same would most naturally have been directed against the person who had in accepting the bill of lading subsequently failed to stamp it."

The same subject was again fully discussed before the Superior Court of Cook County, Illinois, the Hon. M. F. Tuley presiding, in proceedings which raised exactly the questions now before this Court.

Both these points were decided in favor of our contention.

We call the Court's attention to the following quotation:

> "It is contended that the section quoted does not expressly state that the Express Company shall attach and cancel the stamp. *It is, however, a necessary inference that it shall do so.* It is its duty to issue the bill of lading; it can only issue a legal bill of lading, and that is one duly stamped."

Referring to the supposed effect of Section 6, above alluded to, the Court, after discussing it, concludes:

> "But such general language used to designate all classes of persons who may under any provision of the act be required to pay the stamp tax will not be allowed to cast any doubt upon the express provision of the act requiring the express company to issue a receipt to the shipper."

The Court disposes of another contention made by the Express Company as follows:

> "It is contended that this construction put upon the words 'such bill of lading,' if applied to the same words in the next following provision prohibiting the reception by the Courts of 'such bills of lading' as evidence, unless duly stamped, would make the law mean that no stamped bill of lading should be received as evidence. Such a construction could not be made, as it is opposed to the very spirit and intent of the act. The Court is not disposed to be hypercritical as to the use of words by the legislative body, if it can discover the purpose and intent of the Legislature, and, if necessary, it will, in construing the act, reject as surplusage a word that is inadvertently used."

The decision was affirmed by the Appellate Court in and for the First District of Illinois in an opinion filed on March 14, 1859, which quotes and approves the entire opinion of Judge Tuley above referred to. In addition the following language is used:

> "The act of Congress does not affect the common law duty and right of carrier and shipper, as between themselves. It simply superadds to the unaltered common law duty of the carrier to receive and carry, the requirement that it shall issue a receipt or bill of lading for whatever package or parcel it does receive to carry, and that such receipt shall have affixed to it a revenue stamp of the value of one cent. *By every rule of construction and inference, the duty to furnish and pay for the stamp required to be put upon the receipt, which must, under the law, be issued, devolves upon the carrier who is required to issue it.* The carrier must issue the receipt; it cannot issue it unless stamped, without subjecting itself to a penalty many times in excess of the value of the stamp. *It is for the carrier's benefit that the stamp must be affixed and canceled, for without the stamp it cannot do business.* The shipper's rights under the law are not dependent upon the issuance of a re-

> ceipt to him. As to him it imposes no burdens and gives no rights, and is not even necessary as evidence—it is a mere convenience as to him.
>
> "And, besides, it is manifest from the whole act and the purpose it was enacted to aid in accomplishing, that the legislative intent in enacting it was to place a tax upon the business of the carrier, and this the carrier should not be permitted to avoid by forcing its shares of lawful burden upon an unwilling shipper."

The question next arose in Texas, where complaint was made to the Attorney-General to the effect that the express companies were attempting to raise their rates above the amount fixed by statute, for the purpose of reimbursing themselves for the amount of this tax.

The question was considered by the Attorney-General, who thereafter rendered an opinion entirely in accord with our contention, to the effect, to quote from his letter to the Merchants' Association of New York, that

> "The language of the Federal statute plainly pointed out that the express companies must pay the tax; that the shipper is in no sense responsible therefor, for the reason that the express companies are compelled to issue the bill of lading, manifests, &c., and are prohibited from issuing them until the stamp has been affixed."

The question next arose in Michigan, in the case of *Attorney-General* vs. *American Express Co.*, in the Circuit Court of Wayne County.

The decision of the Circuit Court was absolutely in favor of our contention on all points involved.

From this decision an appeal was taken to the Supreme Court of Michigan, and resulted in a judgment of affirmance.

The Court said:

> "The main question in the case relates to the construction to be placed upon the act in question.

"By the act every express company is compelled to issue to every shipper or consignor, &c., a bill of lading for each shipment received for carriage, to which bill of lading and duplicate thereof shall be attached and canceled a stamp of the value of one cent. The law therefore imposes upon the carrier the obligation to issue the receipt. With this the shipper has nothing to do. He delivers the package to the company, pays or tenders the usual charges. This ends the shipper's duty; and the law then compels the carrier to issue the receipt or bill of lading. This bill must be stamped and the stamp canceled. It is evident that it is as much the duty of the company to place the stamp upon the receipt and cancel it as it is to issue the receipt. This duty is made more apparent by the fact that the act further provides that failure to issue the receipt makes the carrier so failing amenable to a heavy penalty.

But it is contended by counsel in a brief filed with this Court that the penalty was directed and intended by Congress to be directed to the failure to issue the receipt and nothing more, leaving the question of the stamping of the same to be settled by the parties.

It seems to us that what is meant by this clause is that the receipt must be such as is provided, that is, a receipt bearing the proper stamp, and that the penalty is provided for such a failure as this. It is and always has been the custom of express companies to issue receipts for goods delivered for shipment. The only interest the government has or can have is the affixing and cancellation of the stamp to aid it in its war revenues. We are therefore led to the conclusion that the duty to issue the receipt and the penalty affixed for the failure to do so implies that it is to be a receipt which would bring the government the revenue provided, therefore the act makes it the duty of the company to affix the stamp."

It is contended by our opponent that a contrary determination has been reached by Judge Purnell,

in the Western District of North Carolina. As the learned Justice appears not to have written an opinion, it is, of course, impossible for us to analyze his reasoning.

The appellee also relies upon a letter written by the Attorney-General to one of the counsel for the Wells-Fargo Express Company. On examination of this letter, however, it will be found that the Attorney-General does not express any opinion as to the merits of the contention as between the shipper and the Express Company. He merely states that the matter is not within my province of consideration." This is perfectly true; but does not affect our present claim, or even purport to be an expression of opinion concerning it.

We may, therefore, we think, correctly claim that the clear weight of all existing authority is in favor of our contention.

12. *In the next place, if the question be asked as to why Congress did not use in the express clause positive language,* such as that in the one relating to Pullman companies, we need only observe at the moment, that, as we shall shortly demonstrate, the express clause was modeled upon an old statute, the meaning of which had long been settled to be as claimed by us; while the Pullman clause was an afterthought first suggested and inserted after the act was nearly completed, and framed without reference to any existing model or authority. The difference in the language used furnishes, under the circumstances, no argument as to any difference of meaning.

(13.) *The Senate debates upon this portion of the act.*

It is of course clear that this Court pays but slight, if any, attention to the remarks made in general debate in the Houses of Congress as indicative of the meaning of pending legislation.

Our adversaries have, however, dwelt with some stress during the arguments below upon certain passages in the *Congressional Record* relating to this statute.

One of these relates to the Pullman Company clause, which we have already discussed.

Another is based upon the provision that only one bill of lading shall be required for bundles of newspapers inclosed in one general bundle, it being claimed that the addition of this clause at the request of a committee of newspaper men was equivalent to an admission that otherwise the tax would have to be borne by the papers.

With regard to this argument it is only necessary to observe that the interpolation removes a possible liability, not merely from the papers, *but from the carriers as well.* It lessens *but does not shift* the revenue from newspaper packages, *but does not at all specify upon whom the burden would otherwise have fallen.* Undoubtedly the journals knew that the express companies would try to compel them to pay a tax on each particular bundle, and undoubtedly they did not wish to accept the chance and expense of a long litigation, but desired such a change in the law as would remove any uncertainty. And undoubtely the Senate was not unwilling to yield to a reasonable request of this nature, especially when made by representatives of such an organization. But other than this, we are unaware of any argument of importance than can be drawn from the debates upon this point.

Since this general inquiry concerning these debates has arisen, however, we wish to ourselves invite the attention of the Court to three points in this connection. They are the following:

(*a.*) On May 19th this particular clause was under discussion, and the attention of the Senators was directed to the effect of the penalties imposed by the act. The question was asked as to the meaning of

the two penalties found in different parts of the statute, in reply the following statement was made:

> "Mr. Gorman: I wish to call the attention of the Senators in charge of the bill to the fact that the penalty in this case for the refusal to use a stamp is only a fine, which I think is right, whereas in every other case the person is subjected to imprisonment where the stamp is not used.
>
> "Mr. Chilton: It is not a failure to use the stamp, it is failure to issue a bill of lading. This penalty is a different thing.
>
> "Mr. Jones (of Arkansas): That is correct.
>
> "Mr. Gorman: In order to escape taxation *the bill of lading will not be issued*, so the principle is the same.
>
> "Mr. Chilton: *The other clause would apply to the corporation for failure to use the stamp.* This is a double penalty, or it amounts to a double penalty. It is intended to force the corporation to issue a written paper."

(*b.*) During the course of the discussion as to the revenue bill, a gross receipt tax upon corporations was proposed and discussed at great length.

Among other statements made in this connection which bear upon the present tax are the following:

On page 6028 Mr. Nelson alludes to the substitution of the gross receipt tax for the stamp act and says:

> "If you include telegraph companies and make them pay a gross earning tax, *you ought to relieve them from the stamp tax, as you propose to do in the case of railroads.*"

This indicates the intent of the party proposing the amendment to do as was done under the old act, substituting a gross receipt tax in lieu of the stamp tax.

(*c.*) In connection with the same proposed amendment as to gross receipts, we call particular attention to the colloquy which took place between Mr.

Pettigrew and Mr. Gallinger with regard to Mr. Pettigrew's proposed imposition of a gross receipt tax upon express companies and other carriers. The colloquy is as follows:

> "Mr. Gallinger: I rise to inquire of the Senator if it is proposed to put this tax upon these corporations *in addition to the stamp tax?*
> "Mr. Pettigrew: Certainly.
> "Mr. Gallinger: *It is an additional tax?*
> "Mr. Pettigrew: Certainly.
> "Mr. Gallinger: Then it certainly ought not to be adopted";

and the amendment was thereupon voted down.

It is submitted that this colloquy, going, as it did, directly to the essence of the stamp tax and the gross receipt amendment, shows unmistakably what the Senate understood to be the effect of the stamp tax.

The foregoing statements clearly show, it seems to us, the intentions of at least a portion of the Senate in passing this law.

14. *In the last place, it must be noted that practically all the railway companies, as we are informed, have acquiesced in our contention,* and have themselves assumed the burden of the tax.

The express companies, we believe, are the only carriers who are attempting to contest the point.

But the duties imposed are all created by the same paragraph of the law, and bind all carriers in the same manner; and hence the construction adopted practically by the railways is of importance as bearing upon the duties of the express companies as well.

In the light, therefore, of all the foregoing arguments and of the authorities bearing upon the point, *it is submitted that the intention of the act itself appears to be, not merely to levy a general or floating tax, nor to levy a tax upon the shipper and*

citizen, but in the exercise of the legislative power as to equitable distribution of the burden of revenue among the various objects of taxation, to impose in this instance a specific burden upon the business of transportation in all cases where goods are accepted by the carrier for that purpose.

(*C.*) *The history of the former War Revenue Laws clearly shows that the tax in question is one upon transportation.*

The imposition of a tax of this nature is by no means a new departure, for a similar clause was contained in the original War Revenue Act passed during the days of the Rebellion.

The original statute was contained in the Laws of 1862, Chap. 119, Sec. 105, and was as follows:

> "That on and after the date on which this act shall take effect, *no express company* or its agent or employee *shall receive* for transportation from any person any bale, bundle, box, article or package of any description, *without delivering to the consignor thereof a printed receipt having stamped or affixed thereon a stamp denoting the duty imposed* by this act, *or without affixing thereto* an adhesive stamp or stamps denoting such duty, and in default shall incur a penalty of ten dollars: Provided that but one stamped receipt or stamp shall be required for each shipment from one party to another at the same time whether such shipment shall consist of one or more packages; and provided also, that no stamped receipts or stamps shall be required for any bale, bundle, box, article or package transported for the Government, nor for such bales, bundles, boxes or packages as are transported by such company without charges thereon."

In the schedule (Schedule B) specifying the amount of the tax thus imposed the following items occur:

> "Express: For every receipt or stamp issued by any express company or carrier or

person whose occupation it is to act as such, for all bales, boxes, packages, articles or bundles for the transportation of which such company, carrier or persons shall receive a compensation of not over twenty-five cents ..... 1 cent

When such compensation exceeds the sum of twenty-five cents and not over one dollar ..... 2 cents

When one or more packages are sent to the same address at the same time and the compensation therefor exceeds one dollar .. 5 cents

This tax continued in force until the passage of the Laws of 1863, Chapter 74.

At this time it was repealed in the following language (see Sec. 6):

> "The duty or stamp required *for transportation* by express companies and others, is hereby repealed and *such transportation* shall be exempt from stamp duty."

By the same act, however, a tax was imposed upon the gross receipts of such concerns, the language of the statute being as follows (see Sec. 10):

> "On and after the first day of April, 1863, any person or persons, firms, *companies or corporations, carrying on or doing an express business, shall in lieu of the tax and stamp duty imposed by existing laws,* be subject to pay a duty of two per cent. on the gross amount of all of the receipts of such express business; and shall be subject to the same provisions, rules and penalties as are prescribed in Section 80 of the act of which this is an amendment for the persons, &c., having the management of railroads, &c."

By comparing the original statute with the present act it is at once seen that the latter is modeled upon the former, the principal differences in phraseology being due to the inclusion in the same section of the new act of all classes of carriers, which was not the case in the former law.

It is especially noticeable that in neither case is there a specific provision as to the party who shall pay for the stamp.

Hence any analogies to be derived from the original statute are of importance in determining the true meaning of the new enactment.

On an examination of the original act the followings points appear:

1. *The original tax was a graded tax, and varied in amounts depending upon the amount of compensation received by the company.*

This is shown by an examination of Schedule B of the original statute.

This point seems to us of significance.

The amount of the tax was evidently not intended to be a greater burden upon the shipper, as the charge which he was compelled to pay increased, but was intended to be a greater burden upon the company, as its compensation for rendering the service became larger.

2. *Moreover the original act contained distinct provisions exempting the company from responsibility from this tax in cases where it carried articles without charge.*

Why should such an exemption have been inserted in the act were it not that it seemed unfair to impose a tax upon the company in instances where no compensation at all was received by it?

The fairness of this exemption becomes obvious when the matter is considered as a tax upon the company and not the shipper.

And on the other hand, it seems meaningless if the tax were intended to be placed upon the shipper and not the company, for there certainly could be no reason as between the shipper and the Government, if the former were intended to bear the burden, *why he should not do so the more readily in cases where no charge at all was imposed upon him*

by the carrier for the services rendered in transportation.

3. *The intent to place this tax upon transportation and not upon the shipper is further clearly indicated by the language of the repealing act.*

The statute says that the duty required *for transportation* by express companies and others is hereby repealed, and *such transportation shall be exempt from stamp duty.*

What more clean cut statement could be desired of the fact that the duty as origanally levied *was a duty upon transportation* and not upon the party for whom the transportation is performed.

4. *The same point is further brought out by the language of the same statute imposing for the first time a gross receipt tax upon carriers.*

For the language of the statute is that after the date specified *all express companies, etc., in lieu of the stamp and tax duties imposed by existing laws* shall be subject to the gross receipt tax specified.

Again we ask, what more precise statement of the nature of the pre existing impost could be asked for than that contained in this language?

This clause as well as the one last above mentioned, are positive declarations by Congress that its intent in imposing the original tax, was to place it upon the transportation business and upon the concerns engaged therein.

5. *In this connection it will be kept in mind that the gross receipt tax which was expressly stated as being imposed in lieu of the stamp duty, is beyond question a tax upon transportation,* the transportation business, and the concerns engaged therein, and is not a tax upon the shipper.

And, as we shall subsequently show, such a tax is not in the case of *quasi* public concerns, permitted to be shifted upon the citizen for the reimbursement of the carrier.

Suffice it, however, to say at the moment, that since this gross receipt tax was expressly stated to be in lieu of the stamp tax, and since the substitute was unquestionably a tax upon the transportation business, it follows that the tax whose place the substitute occupied must likewise have been of a similar nature.

6. *The position which we have taken as to the effect and extent of the former War Revenue Act is directly supported not only by judicial authority but by the interpretation placed upon it by the Express Companies themselves*, and by Mr. Clarence Seward, their own counsel.

The entire subject came up for discussion in the case of *De Barre* vs. *Livingston*, 48 Barb., 511.

In Mr. Seward's brief he reviews the history of the War Tax upon Express Companies. He first alludes to the original stamp tax and then says:

> "The practical working of this provision was so onerous and cumbersome *that the companies applied to Congress to change the method of taxation from the stamp tax upon the receipt or package to a tax upon their gross receipts.* This request was complied with. * * * The stamp was replaced by a duty on gross cash receipts" (p. 514).

Mr. Seward then refers to the Act of June 30, 1864, imposing a tax upon receipts for the delivery of property and says:

> "So the companies *found themselves doubly taxed;* once on their gross receipts, and once for the stamp duty" (p. 514).

Mr. Seward further says that the express companies applied to the Commissioner for relief from this double tax, but that the application was denied. He then says:

> "The Express Companies complied with this decision and used a two cent stamp until

> the next session of Congress, when they applied to be relieved therefrom. Such relief was granted" (p. 516).

In again alluding to the effect of the repeal of the original stamp duty, Mr. Seward states:

> "That Congress changed the method of taxation advisedly and placed the tax upon the gross incomes of the Express Companies *and relieved them from all stamp duties*" (p. 517).

From the language of this brief, as well as the history which it so clearly sets forth, no room is left for doubt as to the nature of the original stamp act as imposing obligations upon the company.

And the same view was entertained by the Court, for its decision clearly shows that it treated the original stamp act as a tax upon the carrier itself. Thus, in alluding to the repeal of the original stamp provision, the Court says:

> "The Act of 1863 repealed all duties by way of *stamps against express companies and substituted in its place a duty of two per cent. on the gross amount of all receipts of the express business.* * * * I think the intent of Congress may be inferred from the previous legislation on this subject. *Originally the companies were compelled to give a receipt with a stamp of one to three cents,* and the provision as to agreements excepted all others contained in the same schedule. And then the Act of 1863 relieved *these companies from all obligation* to pay these duties, and expressly declared them exempt from stamp duty."

What more explicit declarations could be desired to the effect that the original stamp duty was a tax upon the express companies.

For the foregoing reasons it is submitted that the intent of the present War Revenue Act was to

leave without change the carrier's common-law duty to accept goods duly tendered for transportation; that it assumed the continued future performance of this duty as in the past, and imposed upon the carrier, when the duty has been complied with and the goods accepted, the burden of the tax.

We will now consider the right of the carrier to refuse to do this duty, except upon condition that the shipper himself pay the tax.

POINT II.

The imposition of this tax upon the carrier precludes it from relieving itself of the expense by refusing to accept goods for transportation, unless the unwilling shipper himself assumes the burden.

The exact position of the appellee will clearly appear from quotations from his brief in the Court below:

> "The distinguishing characteristic of an indirect tax is the fact *that it may be shifted* from the individual upon whom it is originally imposed, and again shifted until it rests finally where it is most easily borne, as in the familiar instance of duties upon imported goods, where the tax is first paid in bulk by the importer, then by him distributed among his wholesale customers, who in turn exact it from the consumer. * * * The law imposes the tax upon neither party to the transaction, but upon the transaction itself, *leaving it to the agreement of the parties, or the customs and usages of trade* to determine by whom it shall first be paid and on whom it shall ultimately rest.

> * * * Such is the history of excise taxes and duties ever since they have been invented. The importer collects the duty which he has to pay the Government by collecting a higher price for his goods; the distiller collects the revenue stamp by imposing an additional charge upon his consumers; the tobacco manufacturer recoups himself for the Governmental charge put upon his business by making his customers pay a higher price for the manufactured article; and here the carrier would undoubtedly be compelled to increase its rates if it had to bear the tax itself. All such taxes are always borne at last by the consumer as an incident in the cost of the article which he consumes."

Following this line of argument the appellee claims that any carrier who is thus taxed may require the shipper, as a condition of his goods being accepted for transportation, to consent to such an agreement of indemnity.

These claims we combat for the following reasons:

(*A.*)—*The appellee's contention would permit the shifting of the burden, not by agreement, but by illegal duress.*

1. We may admit for the sake of the argument that a party taxed may indemnify himself against such taxation *by contract* with another who is willing to *voluntarily* assume the burden.

2. But we insist that this can only be done *by contract—i. e.*, by the free and willing *assent of both parties*, acting without duress or compulsion. Unless such untrammelled and voluntary meeting of the minds exist there can be no contract.

3. And in the present case it is clear that there is no such assent. The shipper has not only not agree to assume the burden, but is insisting that the carrier shall bear it.

The question here presented is whether the carrier can relieve itself of the tax by its own arbitrary act, wholly independent of the assent of the shipper thereto, and not whether the liability can be shifted by the *joint act* of both carrier and shipper.

4. Since, therefore, there is no such contract of indemnity, the next question is as to whether the carrier may refuse to transport unless the shipper agreed to so indemnify him, thus compelling the shipper to make such a contract.

In support of the claim that the carrier may do this the defendant has cited many instances arising in ordinary commercial transactions, such as the resale of imported merchandise with the duties added to the price, &c.

But such instances are wholly inapplicable to the present case.

In such transactions the parties are perfectly free to contract or not, as they see fit. There is no existing duty upon the one to sell or upon the other to buy. Neither the Government nor the other party can compel the making of such a transaction. And if the parties do see fit to make an agreement it may contain any lawful terms which they are willing to incorporate in it.

In the case of a carrier, however, such a situation does not exist.

The carrier is not free to transport or not as he may see fit. He is bound by law to accept goods for transportation upon tender of his usual charges.

And he cannot evade the duty by attaching to it any conditions which are unlawful or unreasonable.

300 *Tons of Coal*, 14 Blatchf., 453.

Chicago, &c., R. R., v. *Suffern*, 139 Ill., 274.

Garton v. *R. R.*, 1 B. & S., 112.

Southern Express Co. v. *Moore*, 29 *Miss.*, 822.

And if we are correct in our claim that this tax was intended to be borne by him and not by the citizen, it follows that to permit him to refuse to carry unless indemnified, would be to allow him to compel the shipper *to consent to the violation of the tax law by the carrier as a condition of his performing a duty he is already bound to perform, i. e., to allow the carrier to insist upon illegal and therefore unreasonable conditions being attached to his common law duty,* a privilege which finds no warrant in the statute or in the decisions.

In a case like the present, especially where the carrier exercises a monopoly of express transportation between the terminal points, the shipper would be, it is submitted, subjected to duress and compulsion of the most illegal nature if any such condition were allowed to be imposed.

Whatever may be the right of the individual to *contract* for such indemnity in ordinary cases, it surely can have no application to a case where no true contract exists, and where the tax burden is sought to be thus shifted *by compulsion* and against the will of the citizen.

The only construction of the statute and of the carrier's common law obligation which can prevent such an injustice is the one for which we contend, prohibiting such an attempt.

(*B.*) *The results of adopting the defendant's contention.*

As bearing upon the propriety of such a construction, let us look at the results which will otherwise follow.

The business here involved is a *quasi* public business conducted by corporations and other organizations which are *quasi* corporate in their character, operating under privileges and franchises from the sovereign, including in all cases the right to take tolls; and as a consideration for the exercise of these

privileges and franchises the obligation of such concerns to pay a tax to the Government, if desired, entirely independent of all other considerations and independent of any tax which may be levied upon their property has always been fully recognized.

And if it be lawful for those taxed to relieve themselves from taxation by their own arbitrary acts, then follows that the *intent of the Government to exact from the carrier a consideration for these privileges will be entirely nullified;* that the carrier's profit remains the same; that the exercise of these privileges continues without any corresponding burden imposed; *and that the tax upon transportation, instead of being a tax upon transportation, is an additional burden upon the private citizen.*

If such had been the intent of the Congress, why should such a tax have been characterized as one upon transportation and not as one resting upon the individual?

The carrying business of the country is in the hands of gigantic corporations and associations, enjoying public franchises of the greatest value, earning annual profits of immense amounts, and employing hundreds of millions of dollars of capital.

The only provisions of the War Revenue Act directly affecting these organizations is the one now under consideration, which covers them all alike.

Hence it will be seen that if our opponent's contention is correct, *not only the express companies but all of the carriers to which the section in question relates will entirely escape the tax thus imposed.*

Is it reasonable to suppose that this was the intention of the law-making power, and that these concerns were only meant to be appointed *agents* to collect the revenue from the citizen upon whose shoulders they should be free to shift the load?

Or is it reasonable to believe that all carriers, in consideration of the public privileges which they

enjoy, were intended to themselves bear a part of the burdens arising from the Nation's emergency, of the immense wealth which they have accumulated under the Nation's protection—a wealth which in the case of the present defendant enabled it in the year 1897 to make a present to each of its stockholders of an amount in collateral trust bonds issued by the company, and secured by gilt-edge securities, equal to the amount of stock held by the stockholders, to wit, *twelve million dollars out of the profits and surplus fund which it had been able to accumulate during its business career, and without exhausting to the full such entire surplus and profits.*

We quote the pertinent words of Commissioner Atkinson of Georgia upon this point:

> " Aside from these considerations, when we take the broader view and consider the circumstances under which and purposess for which this bill was passed, when we consider that the country was just engaging in a conflict with a great and powerful nation; that in consequence it was necessary to raise by taxation enormous sums of money to maintain the national military and naval forces and equipment, and that, in order to raise this money it was necessary to bring under the taxing power all the resources of all the people; that every industry and every person, even in the most trivial domestic and business concerns, are required by the system of stamp taxation devised to contribute to this common fund; that it is so far reaching in its effect that none could escape the exactions of the tax gatherer. It is not conceivable that the Federal Congress should have selected great transportation companies of the country as the sole object of special legislative benefaction, and taxing all others, exempt them alone from the operation of the law. If it be ultimately held that the carrier is not liable for this tax, he is excused from all contribution to the general fund, for while other corporations are taxed upon special transactions and upon gross and net receipts, these

> corporations are exempted from that class of taxes, and throughout the whole scheme of this elaborate piece of legislation there is no provision which by any possibility can be so extended as to impose upon the carrying companies of the country any portion of the common burden. It is submitted that to attribute to the Congress such a purpose would be to deny to it credit for either patriotism or a proper sense of justice."

(*C.*) *The intent of Congress as shown by various enactments.*

1. That it is not the intent of Congress in this case, and never has been its intent in other similar cases that the results just alluded to should be within the power of the carrier to accomplish at will, seems clear from an examination of the former War Revenue law relating to railroads.

The language of the Law 1864, Chapter 173, Section 103, upon the point, is as follows:

> "That all persons * * * or corporations owning or possessing * * * any railroad * * * shall be subject to and pay a duty of two and one-half percentum upon the gross receipts of such railroads * * * *provided that all such persons, companies and corporations shall have the right to add the duty or tax imposed hereby, to their rate of fare whenever their liability thereto be commenced, any limitations which may exist by law or agreement with any person or company which may have paid or be liable to pay such fare to the contrary notwithstanding.*"

The Court will observe that this particular law contains an express grant of a privilege to shift the burden imposed.

But why was this special proviso and privilege inserted in this section?

Manifestly because it was recognized by Congress that if such rights were not granted, the railways

would have no power to reimburse themselves for the tax levied.

Manifestly because it was understood by Congress that the imposition of such a tax, without any further provision, would be equivalent to a prohibition against the shifting of the burden from the carrier to the citizen.

In other words, in the section just quoted it was the intention of Congress to make the carrier really the collecting agent of the Government, and to impose the tax not upon the carrier but upon the traveling public. And it was seen by Congress that unless an express clause to that effect was inserted in the act its intent would be defeated, and the tax would be a tax upon the transportation business, to be borne by it alone without recoupment, and not a tax upon the individual.

It may be urged in opposition to this view that Congress only intended to cover cases where fixed contracts for definite rates had theretofore been made by the carriers, or where special *statutory* limitation upon charges existed.

Such, however, is a forced construction.

The language refers to any limitations "*by law*," not "*by statute*," and evidently is intended to cover cases not only where special enactments exist, but also cases where the carrier is subject only to the operation of the ordinary common law rules by which it is limited in its charges to reasonable rates.

There is no less a limitation in the one case than in the other, for in both the carrier may demand only a reasonable compensation. But of this not even the Legislature can deprive him.

It is submitted that this statute constitutes a legislative declaration in the clearest terms that in cases of this description, where a tax is imposed upon a *carrier*, there always exists a prohibition against the transfer of the burden at the will of

the carrier alone, unless such power be expressly granted.

2. And upon a further examination of the old war revenue laws, it will be found that neither in the original Express Tax Act, nor in the statute substituting a gross receipt tax upon express companies in place of the former stamp act, was there *any provision whatever to the effect that the express companies should be authorized to recoup these taxes by raising rates, or by directly or indirectly compelling the burden to be borne by their customers.*

Hence it seems to be a necessary inference that a different intent was cherished by Congress with regard to this particular tax, and that the burden of the legislation concerning express companies was desired to fall not upon the citizens, but upon the concerns by whom the tax was primarily payable.

And, as we have already shown, this burden was then accepted and acquiesed in by the express companies until the law is amended.

The similar absence of any such privilege in the present express company tax act shows that under the new law, as under the old, the company is intended to bear the tax.

3. This interpretation appears to be emphasized by another result of the present act.

For it is clear, that none of the carriers taxed can raise rates to recoup themselves for the tax in cases where such rates are fixed by statute. The provision of the old statute as to railroads is entirely omitted in the new law.

Hence, it was certainly the intention of Congress that *in such cases, at least*, the burden of the tax should be borne by the carrier and should not be placed upon the shipper.

And from this it follows, if the contention of our adversaries be correct, that a difference exists between the rights of the carrier on the one hand, where statutory limitations of rates exist, and on

the other hand, where there are no such limitations. For in the *latter* case they say the carrier is free to shift the burden, while in the *former* he is bound to bear it.

But why should it be supposed that the intent of Congress was that the carrier whose rates are not limited should have greater privilege than the carrier who is already restricted.

The situation in the former case is already much more favorable to the carrier than in the latter.

If it is no injustice where the carrier's charges are regulated by statute to compel them to bear the burden of this tax, why should it be injustice where no such regulation exists, and where they have been free to fix the highest reasonable charges for their services?

Rate legislation is *invariably repressive.*

If there be any situation in which the carrier needs protection *it is where such legislation exists* and not where it does not exist.

And if Congress does not see fit to extend such aid when it is most needed, why should it be supposed to be willing to extend it in situations where it is least required?

In other words, where a carrier's rates are already limited by statute Congress certainly intended to impose upon it the additional burden of the tax.

There is no reason why it should be supposed not to have intended the same result where no statute exists.

This conclusion is made more clear by keeping in mind the real nature of rate legislation.

It does not change or do away with the general common law rule that a carrier may charge reasonable rates, the amount of which may always be inquired into by the Court.

It is simply a declaration by the legislative power of what in its opinion is a reasonable rate. This declaration is not even conclusive, for if, as a matter

of fact, such figure be unreasonable, the courts will so declare it.

In either event, whether such legislation does or does not exist, the same general principle as to reasonableness governs the question of rates. And this being so, there appears to be no such difference between the situation of the carrier in the one case and in the other which should make it reasonable to suppose that the carrier was intended to have the right to increase rates in the latter class of cases to meet the tax, while not possessing this right in the former class of cases.

Hence, as it has been in effect declared by Congress that such a right can only exist in the former class, at least, by an express grant, and as no such grant exists in the present act, the inference appears very strong that no such right was intended to exist in either class.

4. Further light is thrown upon this question by the examination of other provisions in the former revenue acts.

In the Acts of 1862, 1863 and 1864, were several provisions imposing taxes upon interest payments, coupons and dividends, made, issued, or declared, as the case might be, by various corporations.

See Laws of 1864, Chap. 173, Sec. 122.

It was clearly recognized at the time that questions might arise as to whether this duty was one levied upon the various corporations mentioned, or upon the individuals to whom the interest or dividend payments might be named. And with the intent of placing this matter at rest, Congress especially provided in the acts alluded to that it should be lawful for the corporation to deduct the amount of such tax from the amount of any interest or dividend payment which otherwise might be made.

With such provision as this there would at first seem to be no doubt that the tax was intended to

be one upon the stockholders or creditors and not upon the company.

And yet it is most interesting to notice that even under such provisions this Court has, on several occasions, said that this tax was one *upon the company* and not upon the stockholders or creditors.

Barnes v. *The Railroads*, 17 Wallace, 294.

Bailey v. *The Railroads*, 22 Wallace, 63.

Railroad v. *Slack*, 100 U. S., 5957.

The Court has on several other occasions given expression to the contrary view.

United States v. *The Railroad*, 17 Wallace, 322.

Stockdale v. *Insurance Co.*, 20 Wallace, 329.

See 106 U. S., at page 327, &c.

But the point to which we wish to call attention is that if even under such an express provision it could be even intimated by the United States Supreme Court that the tax was upon the company and not upon the individual, *what would have been their ruling had no such power to deduct been incorporated into the Act?*

Is it not most probable that the uniform opinion of the Court would have been that the tax was a corporate and not an individual obligation?

And would a power to deduct the amount of the tax from the dividend or interest payment, i. e., a power of recoupment similar to that now claimed to exist, have been implied under such circumstances?

We think not.

(D.) *The prohibition against the carrier's relieving itself of this expense applies to all attempted increase of its charges for that purpose, whether in the form of a direct transfer of the tax, as such, upon the shipper, or of an indirect recoupment under the guise of a raise of its rates.*

The points arising in this connection are two-fold:

I.—*The present case does not involve an attempt upon the part of the carrier to make a reasonable increase of rates within the legal signification of the term.*

The carrier has not accepted the tax as a tax upon the transportation business, and attempted to earn an additional sum equal to the burden thus imposed *by an equitable and proportionate revision* of *all its rates* for transportation.

It has simply attempted to transfer the tax *as a tax* upon the shipper by adding the *exact amount* of it to the rates heretofore established.

The tax is not made a part of the rate, but is an additional and distinct item (see Answer, fols. 19, 20), *which the shipper may defray by producing the stamp itself instead of an additional sum equal to its price.*

The facts show a direct attempt to compulsorily shift the tax bodily upon the shipper and not to revise rates so as to meet an increased cost of operation.

Whatever the reasons for this course may have been, the fact is clear that the shipper is required to pay the tax *as a tax*, and that no revised schedules of rates has been adopted.

The point was commented upon in the Illinois decision above referred to as follows:

> "It is apparent therefore that in demanding this tax of the shipper, *the Express Company has made no revision of its rates*, nor in fact fixed any increased rate, and that there is *simply an effort of the Express Company to make the shipper pay the tax.* * * *
>
> It is *not a revised increase* of rate because it adds to the former rate the same amount in each case or transaction. * * *
>
> The power to revise its rates and fix a reasonable charge or rate *does not authorize it to*

> *arbitrarily increase all its rates by a horizontal increase thereof* without regard to whether such increase leaves a rate as to any particular shipment a reasonable or unreasonable one. * * *
>
> It is an arbitrary attempt of the Company to make the shipper pay the tax which the law requires the Company to pay. The Court must regard the substance and not the pretence."

In the Michigan case above quoted, the language of the Court on this point is as follows:

> "It is contended, however, that the Company has the right to make new regulations and establish new rates to meet the burden. It is conceded that the effect of this is to throw the burden upon the shipper.
>
> It is apparent upon the face of this proceeding that the very purpose of this change in the regulations and the increase of rates is to avoid the payment of the tax, and thus cast upon the shipper the burden which the Act of Congress puts upon the Company. *This is but an evasion and a subterfuge to avoid the terms of the Act.* The pretence that by raising the charges on each package just one cent without reference to the distance to be carried, the weight or bulk of the package, and the former fixed charges, is a regulation of charges, can hardly be treated seriously."
>
> *Atty.-Gen. ex rel. Moore* v. *Am. Ex. Co., supra.*

The facts of this case, therefore, do not bring up the question as to whether the Express Company has the right to make a *bona fide* revision of the rates in order to meet increased operating expenses.

They simply show a direct attempt on the part of the carrier, and even without disguise, to evade the burden of the tax by transferring it directly and by compulsion to the shoulders of the citizen.

And this attempt cannot succeed if our preceding arguments are well founded.

II.—*Even if the company be permitted to designate its increased charge as a raise of rate, it is nevertheless an unlawful act.*

The reasons for this are the following:

1. *If such an act were permitted, the company would be allowed to indirectly do a thing which it could not do directly.*

By whatever name such a transaction may be called, the results are the same.

The burden which was intended to be placed upon the carrier is thrown upon the shipper.

This is accomplished *without any contract* or agreement, direct or indirect, on the part of the shipper.

It is accomplished solely by the will of the *carrier, who relieves himself of this expense through compulsion and duress* exercised upon the shipper, and against his opposition.

And this purpose is permitted to be carried into effect by *allowing the carrier to refuse to do his common law duty, except upon the condition that the shipper shall permit him to violate the War Revenue Act.*

In any event, and by whatsoever means this is accomplished, *the carrier is exonerated at the expense of the citizen and the intent of the tax legislation is nullified.*

We have already endeavored to show that the construction of this statute, in the light of the carrier's, common law duty, imposes upon it a prohibition against such a compulsory shifting of the burden.

And if we have succeeded in demonstrating this contention, it follows that the result is precisely the same as though the War Revenue Act itself had contained an express provision that the burden of the tax should be borne by the carrier, and should not be shifted.

If such an express provision existed, it could

hardly be claimed that the carrier had a right to violate it directly or indirectly.

But there can, it seems to us, be no difference in the result whether such a prohibition arises from express language or from the necessary inferences to which we have alluded.

In either case, if it is a prohibition at all, *it must prohibit;* and to be effectual, it must prevent not only direct violations, but indirect ones as well. *And, therefore, it must be construed to prevent the carrier from accomplishing an evasion of the law by compulsion, whether exercised under the name of a raise of rates, or otherwise.*

2. *It is argued by the defendant as justification for such a raise of rates that the present tax is in the light of an additional operating expense,* and that it is always legitimate for a carrier to meet such an increase in cost of transportation by a corresponding increase in the shippers' rates, thus leaving the carrier exactly the same measure of profit as that which it derived before.

This claim we deny.

The tax in question is not one imposed merely upon property owned by the company.

It is a tax imposed *upon the business of transportation*—upon transactions which the carrier is not free to perform or not, as it sees fit, but which it is bound to undertake. It is a tax, which, as we have already shown, is intended by the Government *to be primarily and ultimately borne by the carrier.*

Such a tax should not, we submit, be construed in the same light as an ordinary expense, as bearing upon the question of the reasonableness of the rates charged the shipper by the carrier.

We think there is a clear line of distinction between the relationship of the carrier to the shipper on the one hand and the relationship of the carrier to the Government on the other.

We think it proper that all of the ordinary and necessary expenses of the carrying business resulting from its very nature should be considered in determining the question as to whether the charges imposed upon the shipper for these privileges are reasonable.

But we think that when this question has once been determined, and when a reasonable rate—as, for the sake of argument, we will assume it to be—has been established between the shipper and the carrier, based upon these ordinary and necessary expenses of the business, and when this rate has been seen to be productive of a certain profit to the company, which it has obtained by the exercise of *quasi* public franchises and privileges, *and when in view of these privileges and their consequent profits, the legislative powers have determined to impose upon the companies enjoying them a part of the burden of the national revenue*, instead of imposing a tax of an equivalent amount upon the citizen—that then, in view of these circumstances, it is not permissible for the company to treat this tax, imposed for these reasons, as being simply an additional expense of maintenance and operation in such manner that it may transfer the burden of it upon the citizen where it was not originally intended to be placed, *and thus continue to receive itself just the same profits as those upon which it was the intention of the Government to impose this liability.*

The test seems to us to be the result which follows from such action.

And there can be but one result which will follow if it is permitted to treat such a burden as an operating expense, and that is, *that the intent of the legislation, which was to impose the burden upon the business of transportation, and upon the profits which were derived from that business, will be entirely defeated; the profits will remain untouched; the carrier will successfully avoid any contributions*

to the National Treasury; and the burden will rest upon the citizen.

Such a result is not a reasonable one.

We have searched in vain for any authorities which will establish a right of this nature in a common carrier.

3. As a further justification for such a course, it has been urged by the appellee that a carrier always has the power to revise its rates as long as they are reasonable, that there is no proof offered by the appellant to show that the present increase of charges is unreasonable, and therefore that their action in this regard is not subject to attack in this proceeding.

The answers to this argument are the following:

(*a.*) *No act can be reasonable which is illegal.*

And if we have shown in the preceding discussion that the statute and the common law when taken together prohibit the shifting of this burden by compulsion either under the guise of raising the rates, or otherwise, it follows that any attempt to do so must necessarily be considered as unreasonable.

(*b.*) *No burden would in any event rest upon the appellant to show affirmatively that the increase in charges is unreasonable, but on the contrary, the burden will be upon the appellee to affirmatively show that it is reasonable.*

We certainly do not admit that even if such proof were presented it would be sufficient to defeat the operation of the law; for the act is a tax act, and the power of taxation is not trammelled save by constitutional prohibition.

Nor do we admit that such a point can be properly urged in a proceeding of this nature, or upon this appeal.

But, aside from such considerations, and even if

the question be material, *the carrier*, in order to avail himself of it, *must affirmatively show* that the burden of the tax reduces its rates to an unreasonable sum.

In other words, if the question of reasonableness or unreasonableness of rates under the operation of the law is open for discussion, *it must be governed by the same principles as those which apply in other cases where Legislatures have attempted to regulate the rates of carriage.* And the rule as to proof in such cases is that the statute is presumed to be a reasonable one, and the burden of proving the contrary is upon him who attacks it, and that unless such burden be sustained the act will remain in force.

> "Without undertaking to define the words reasonable and unreasonable, it is sufficient to say now that the *presumption is that a rate fixed by Congress is reasonable, and cannot be overcome except by some showing of figures and other facts as to the earnings of the road in question;* that is, expenses and receipts during an adequate period."
>
> *Atlantic & Pacific Railroad Co.* vs. *United States*, 76 Fed. Rep., 186.
>
> *Railroad Co.* vs. *Wellman*, 143 U S., 339.
>
> *Dow* vs. *Bedelman*, 125 U. S., 680.
>
> *Budd* vs. *New York*, 143 U. S., 117.
>
> *Reagan* vs. *The Trust Co.*, 154 U. S., 401.
>
> *Ruggles* vs. *Illinois*, 108 U. S., 541.
>
> *Missouri Pacific Railroad* vs. *Smith*, 29 S. W. Rep., 752.

As further bearing upon the question of the burden of proof, it must be kept in mind in the present instance that we find the *rates prior to July* 1, 1898, *had been long established by the defendant, and that since that date the rates have been increased.*

This fact alone, even in the absence of statutory restriction, has been held to be sufficient to throw the burden of the reasonableness of this change upon the carrier.

3 Interstate Commerce Commission Reports, 688.
5 Interstate Commerce Commission Reports, 13.
Wells vs. *Oregon Ry.*, 15 Fed. Rep., 561.

Hence, if any such question were investigated, unless the appellee can make some showing of expenses and income, *not in general language and estimates, but in the way of precise and specific facts* from which it will appear that the effect of this burden, if borne by it, will be to compel it to conduct its business upon an unreasonable basis, the appellant must prevail.

It would not be incumbent upon the appellant to enter, in the first instance, into any such computation.

(c.) *Since the record is silent upon this point, it follows that no presumptions can be indulged in to the effect that the tax would be an unreasonable burden upon the carrier.*

On the contrary, as shown by the foregoing discussion, it is to be assumed that, even if Congress intended the carrier to bear the tax, it will still earn a reasonable net return from its business.

Hence even if the increase in charge be considered as a true raise of rates, within the legal acceptation of the term, it stands upon the record as without sufficient reason, and therefore unjustifiable, if it be held that our view of the meaning of the statute is correct.

POINT III.

The first question certified should be answered to the effect that the war revenue law imposes the tax in question exclusively upon the carrier.

The second question certified should be answered in the affirmative.

Respectfully submitted,

FREDERIC R. KELLOGG and JAMES B. DILL,
ALLAN L. MCDERMOTT,
Of Counsel for Appellant.

No. 248.

Brief of A. McDermott, Esq.

Filed Oct 9 1899

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MACRELLISH, DAY & MACRELLISH, Printers and Stationers, Trenton, N. J.

Supreme Court of the United States.

WILLIAM CRAWFORD,
Appellant,
against
WILLIAM L. HUBBELL, Treasurer of the Adams Express Company,
Appellee.

17,345.

October Term, 1899.

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Brief of Allan L. McDermott, for Appellant.

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Brief of Allan L. McDermott, for Appellant.

Statement.

The questions certified to this court by the United States Circuit Court of Appeals in and for the Second Circuit, are:

(1). Does the War Revenue Act of June 13th, 1898, impose upon the carrier exclusively the tax represented by the stamp to be affixed to each bill of lading, manifest or other evidence of receipt required to be issued to each shipper of

goods accepted by the carrier for transportation, or does it impose the tax merely upon the transaction of the shipment, leaving it to be paid indefinitely by either party thereto?

(2). If the War Revenue Act of June 13th, 1898, does impose such tax exclusively upon the carrier, does it preclude the carrier, who is by such act required to issue to each shipper a bill of lading, manifest or other evidence of receipt, from relieving itself of the expense of offering and cancelling the stamp required to be attached to such bill of lading, manifest or other evidence of receipt?

Argument.

I.

It is against public policy to leave the question of payment of this tax to individual adjustment.

Common carriers must have uniform rates, but if it is held that the payment of this tax is to be agreed about between shipper and carrier, and that no duty is upon the carrier while this agreement is reached, it necessarily follows that parties are unrestricted in reaching their agreements. The defendant can refuse to carry the packages offered by the plaintiff unless the tax is paid, but

will be at liberty to pay the tax upon the consignments of a competing merchant. If the law has not placed the burden—if it is a shiftable tax, with the carrier in charge of the shifting machinery—a new door has been opened for unjust discrimination in the cost of transportation. If the payment of this tax is to be according to agreement between shipper and carrier, each transaction may be the subject of a separate agreement, and the carrier may yield to one shipper and refuse another. If the attitude of the government is impersonal as to one transaction, it must remain so as to subsequent shipments. If it is true, as contended by the appellee, that the "transaction of shipment cannot occur," unless shipper and carrier agree, each transaction will afford basis for a new agreement, and the carrier may discriminate. If it was not the intention of Congress to tax the carrier, it would be manifestly unfair to say that his agreement to pay the tax in one instance would establish a rule to be followed in all subsequent cases.

II.

The appellant demands that the company shall discharge its common law duty. It is bound to ac-

cept the goods for transportation, and this duty is in nowise affected by the War Revenue Act.

It is the duty of the express company to issue "a bill of lading, manifest or other evidence of receipt and forwarding." A failure to issue this evidence subjects the express company to a penalty. To each bill of lading, or duplicate thereof, there must be "duly attached and cancelled, as in this act provided," a one cent stamp.

The stamp must be affixed and cancelled by the express company. Section 6 of the War Revenue Act provides that the person using or affixing the stamp shall cancel it, and as the express company is penalized for failure to issue a receipt bearing a cancelled stamp, it follows that the stamp is to be cancelled by the express company.

So far as any given case is concerned, it may be a matter of indifference to the consignor whether a receipt is issued. The law does not visit him with any penalty for failure to receive a bill of lading. He can maintain an action if the express company fails to perform its duty as a common carrier, the law providing, as against the consignor, only that an unstamped receipt shall not be used in evidence, a provision effectual in State courts only through comity.

The common law imposes a duty on the common carrier. It must, being tendered its carrying charges, carry the goods. As to its relations with the government, the matter is, to the appellant, an impersonal one. The receipt is to be given after goods are "accepted for transportation," and the validity or extent of the contract for carriage is not affected by observance of the War Revenue Act. The carrier cannot say: "The government has made it my duty to give you a stamped paper evidencing what I am to do with these goods. I will not perform my duty as common carrier unless you pay for the stamp imposed on that paper."

In the case of a contract between persons upon neither of whom a duty is cast, the government may well maintain an impersonal attitude; but where the law imposes a duty to perform service, it is against public policy to put it in the power of him upon whom the duty is devolved to say that he will not perform it unless the applicant for performance will make two payments—one for the service requested and the other of a tax imposed upon the person who is bound to render that service.

The act is entitled "An act to provide ways and means to meet war expenditures and for other

purposes." It is presumable that Congress, in fixing the taxes therein found, calculated the revenue obtainable from the probable business of common carriers, and it would be impossible to make such a calculation if the business of these carriers was divorced from their duty to the public. The object of the act negatives the idea that common carriers can refuse to perform their public or *quasi* public functions unless consignors pay the tax imposed upon those carriers. It does not subtract from the duty owing from the carrier to the public. It does not weave into the law governing those duties the right to demand return of a tax imposed upon the carrier. No duty being imposed upon the consignor, the common carrier cannot say that he will not discharge his duties, as such, unless the tax imposed upon him is paid by the consignor.

When a package is presented to a common carrier, for transportation, he may not receive it or reject it, as he wills. He is bound to receive it and carry it. That is the duty he owes as a common carrier. He is bound to pay, on each package received, revenue to the government. The duties are separate and distinct. One he owes to the consignor the other to the nation. He cannot avoid the latter by refusing to perform the former,

nor can he make relief from the duty to the government a condition precedent to his performance of duty to the would-be consignor. The act does not add to or subtract from the duty to accept for transportation, and it is only after he has accepted the goods "for transportation" that a tax is imposed.

To say that the law authorizes a common carrier to refuse to receive goods unless he is secured against a tax to fall due after he has received the goods is to hold that the probable revenue from common carriers is to be calculated in the light of their right to refuse to perform their common law duties unless they are relieved from the impending tax. If this is true, the taxing power may be truly said to have viewed the relations of the parties as impersonal to the government, and left the consignor and common carrier to adjust the payment of the tax between themselves. But that it is not the true construction of the act seems clear from the fact that the tax is to be paid by the common carrier when he undertakes a duty of which he cannot legally refuse performance.

III.

The receipt is not made, signed or issued for the use or benefit of the consignor, but for the benefit of the government.

The "*Express and Freight*" clause in Schedule "A" provides that there shall, to each bill of lading therein commanded to be issued, be "duly attached and cancelled, as in this act provided," a stamp. If the carrier fails to issue any paper, the penalties provided by section 13 cannot be inflicted. This clause puts upon the carrier the duty of issuing a paper that can be stamped. The duty to create this paper arises when goods are accepted for transportation. There is not any penalty pronounced in this clause, against the carrier, for issuing an unstamped receipt or bill of lading. If this clause was alone in regulating penalties for omission, it would be clear that it was the duty of the carrier to issue the receipt, and the stamp could and would be affixed or rejected, in accord with the desire of the consignor to use it as evidence of his rights.

But this clause provides that there shall be, to each bill of lading, a stamp "duly attached and cancelled, as in this act provided," while section 7

provides a penalty for *making* a receipt without affixing a stamp. The intent of the maker is irrelevant under this section. Section 13 provides severer penalties for failure to stamp, with intent to avoid the provisions of the act. It is apparent, from these sections, that the "*Express and freight*" clause, when it provides for the issuance of a receipt, with a stamp "duly attached and cancelled," creates the "duty" of issuing a properly stamped receipt. The rules of construction leading to this conclusion are elementary.

It being found,

(a). That the act imposes upon the carrier the duty of issuing a paper to which a stamp can be affixed.

(b). That the stamp must be affixed before the paper is made, signed or issued.

(c). That the common law duty of the carrier is not affected by the act.

It follows that the attitude of the government is not impersonal between the would be consignor and the common carrier, for section 6 provides that the tax in respect of the receipt, or for and in respect of the paper upon which it shall be written or printed shall be paid "*by any person or persons, or party who shall make, sign or issue the same, or for whose use or benefit the same shall be*

made, signed or issued." The paper described in the clause of "Schedule A" is not issued for the "use or benefit" of the consignor. It is, so far as this act is concerned, an instrument created for the benefit of the government, to ensure the collection of a tax imposed upon the maker of the receipt. Its forms are described to include "a bill of lading, manifest, or other evidence of receipt and forwarding." Its creation is made a "duty," not to the shipper, but to the government. The carrier is bound to issue the bill of lading; the shipper is not bound to receive it. It need not contain the contract between shipper and carrier.

So far as this act is concerned, I respectfully insist that the government having, to obtain revenue, provided that common carriers shall issue stamped receipts, those receipts cannot be said to be made, signed or issued for the benefit of the consignor. So far as this act is concerned, the shipper is in the position of a passenger who knows that, having tendered his fare, he is entitled to ride without regarding the fare indicator at the end of the car. The act having provided, for the benefit of the *government*, a method of taxing common carriers, the shipper cannot be compelled to pay that tax merely because the law has put him on guard over its revenue.

In the arguments for the carriers, section 28 has been often referred to as illustrating what Congress "would have said" if it had been intended to tax the express companies. That section provides a penny tax on each seat or berth sold in a parlor or sleeping car, "the stamp to be affixed to the ticket and paid by the company issuing the same." The circumstances inviting the act to the statute book also beckoned celerity, and the taxation of seats and berths is found between sections taxing, respectively, sugar and legacies. Like all hurried legislation, the act bears the marks of many pens, but the phraseology of section 28 does not make for the argument of the express companies. Rather will it be reasoned "why should the carriers of wealthy travelers be directed to pay the tax while the carriers of goods escape?" Very dim light can, at the best, be obtained by comparing burdens imposed by a War Revenue Act, and I respectfully submit that the pertinent sections provide that common carriers shall pay the tax and that the receipts are the only means insisted upon to insure that payment.

IV.

Whether an express company may, because its taxes are increased, advance its rates, is not involved in the question *sub judice*, for the defendant does not pretend to have revised its rates. It does not demand anything additional to the old rates for the transportation of goods, nor pretend that the cost of carriage has been increased. It does not include the penny tax in its rate for carriage, but says that it will not perform its duty as a common carrier unless it is reimbursed for a tax imposed upon each shipment received. A common carrier cannot demand anything except payment for carriage. An express company cannot demand, for the performance of its duty to a shipper, its rate for carriage, *plus something*. A prudent carrier will undoubtedly include, in its rates for transportation, items to meet its fixed charges, but it would be an amazing doctrine that would establish the right of a common carrier to charge, on each package, large or small, without respect to distance of carriage, a penny contribution to a sinking fund for the payment of its debts. Yet the rates fixed by a common carrier may, and probably should, be fixed with a reasonable reference to the liquidation of its debts. The

duty of an express company to receive, carry and deliver, when there is nothing objectionable in the consignment, is absolute, and it is bound to perform this duty when it is offered the reasonable compensation for *receiving, carrying and delivering*. To this time honored and protected common law proposition, it was surely not the intention of Congress to make the addenda insisted upon by the defendant, that if the shipper will not pay a tax imposed upon the carrier, "the only result which must follow is that the transaction of shipment cannot occur."

V.

As the express company cannot make the payment of the tax by the shipper a condition precedent to the receipt of goods for transportation, it follows that the tax is imposed exclusively upon the carrier. It must receive the goods; it must issue the receipt, and it must provide, affix and cancel the stamp.

As the duty of providing, affixing and cancelling the stamp is imposed upon the carrier, it cannot relieve itself by reimposing the tax, specifically, upon the shipper. If any reimposition is allowable its terms must be found in a redistribution

of all the expenses of the carrier upon all its business. It must collect this tax if at all, in the same way that it collects the taxes imposed by States and municipalities. The shipper cannot, in order to have that carried which the law says shall be carried, be compelled to pay for carriage *and something else*. Whether, in the cost of carriage, the war tax may be included by any scheme of indirect reimposition of the tax upon all the business of the carrier, is not within the mooted points, involving, as it does, the question of whether this tax upon the carriers would justify a readjustment of their rates.

ALLAN L. McDERMOTT,
Counsel for Appellant.

Office Supreme Court U. S.
FILED
OCT 30 1899
JAMES H. McKENNEY
Clerk

No. 248.

Brief of Dill for Appt. (Reply)

Filed Oct. 30, 1899.

Supreme Court of the United States

WILLIAM CRAWFORD, Appellant, AGAINST WILLIAM L. HUBBELL, as Treasurer of the Adams Express Co., Appellee.	October Term, 1899. No. 248.

Replying Brief on behalf of Appellant.

There are several points suggested by the answering brief of the appellee which are perhaps worthy of further consideration.

These we will state separately:

I.

The claim of the Appellee as to injury in case it be compelled to pay the tax.

In various parts of the answering brief statements are made to the effect that if the tax is borne by the appellee, injury of the most serious nature to its business will occur.

Thus it is stated on page 3, "To the Express Companies the case is one involving almost their existence." (See also pages 17 and 18.)

These observations are not based upon anything contained in the present record.

In reference to them we only desire to observe that there is absolutely no reason why any presumption should be indulged in to the effect that this tax, if paid by the carriers, would reduce their profits to an unreasonable figure. In fact, the presumption, as we have pointed out in our principal brief, is exactly the other way.

On page 21 this argument is attempted to be strengthened by the statement that it must be assumed that the old rates of the companies were reasonable, and that if the companies were now compelled to accept twenty-four cents in lieu of a former reasonable charge of twenty-five cents, the reduction must be presumed to be unreasonable.

There seems to be no ground whatever for any such assumption.

Its net profits prior to the tax law may have been, for anything we know to the contrary, anywhere between six per cent. and sixty per cent. per annum. As to this the record is silent.

And if, as a matter of fact, it had been earning at the rate of sixty per cent. per annum and those earnings were cut down by the War Revenue Law to fifty-seven and a half per cent. as a consequence of a burden which Congress intended to impose upon them, that fact alone would not enable the carrier to claim as a matter of law that its reduced earnings had now become unreasonably small.

II.

As to any presumption arising from the fact that the tax is a stamp tax.

It is suggested in pages 6 to 10 of the brief that

the fact that this tax is a stamp tax raises the presumption that it was not intended to be imposed on the carrier.

We have already shown in our principal brief that the tax relating to express shipments imposed by the law of 1862 was intended to be placed upon the Companies, and not to be a mere shifting tax.

And since this tax, like the present one, was a stamp tax, that fact alone is sufficient answer to the appellee's argument in this regard.

III.

The question as to whether this tax would be a direct tax if intended to be borne by the companies.

On page 11 the appellee suggests that our argument would lead to the conclusion that this tax is a direct tax and is unconstitutional.

It is not necessary at the present time to argue extensively the question as to whether or not this result would follow if our views of the law were adopted. We are wholly unable to see any constitutional objection to the levying of a tax in the nature of a license or occupation tax upon such businesses as that of a common carrier. This certainly can be done by the States, unless in violation of the United States Constitution (103 U. S., 344), and by the United States within the scope of its power of taxation (9 Wall., 41 ; 16 Wall., 36 ; 5 Wall., 462).

But, aside from this, it remains to be observed that if we are right in our interpretation of the statute, then, even though the intent of Congress may have been to do an unconstitutional act, that fact is no warrant for the placing of the burden of

the tax upon shoulders that were not intended to bear it.

If, as between the carriers and the Government, the tax were unconstitutional, there is ample remedy for the carrier, but this remedy does not lie in the direction of compelling the shipper to pay the tax.

IV.

The effect of Section 6 of the Act.

In point IV of the answering brief the appellee lays the greatest stress on Section 6, which we have already discussed to a certain extent in our principal brief. It claims that the provision of this section to the effect that the tax shall be paid "by any person or persons or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued," includes in the case of express shipments the carrier on the one hand as the person who issues the receipt, and the shipper on the other as the person for whose use or benefit it is issued.

In addition to the arguments we have already advanced in our principal brief upon this point, there are certain further considerations to which we invite the Court's attention. These are as follows:

(1.) The Statute does not say that the tax shall be paid either by the party who issues the receipt *or by the party to whom it is issued.*

The second alternative specified in the section requires *more than the mere acceptance* by one party to the transaction of a document which the other party issues. It does not even require any acceptance at all of this document.

The only thing which is essential is that it should

have been issued *for the use or benefit* of a party other than the one who actually issued it.

(2.) This alternative would only apply to the party who receives a document in the event that it was actually beneficial or useful to him.

This manifestly would not apply to cases like the present where the document is issued pursuant to the peremptory requirement of the Government as a means of ensuring the collection of the tax wholly irrespective of the interests or desires of the person to whom it is issued.

(3.) When we compare this provision with the other items of Schedule A, it is clear that in the greater part of the instances mentioned the transactions cannot take place without the issuance of a document for the use or benefit of the other party to the transaction—*i. e.*, as in the case of insurance policies, promissory notes, bonds, etc., etc. The only reason why such documents are issued is for the use and benefit of the other party to the transaction and because they are desired by such party; and in regard to such instruments as are optional between the parties and which are not compelled to be issued by the Government, there is no reason why the payment of the expense should not be left to the agreement of the individuals.

But when we take the case of a document whose existence is peremptorily required by the Government and in regard to which the parties have no option whatever, even though it may not be required by one party to the transaction for his own use or benefit, we find a case to which the second alternative of Section 6 does not apply, and in which only the first alternative,—to wit: that the tax must be paid by the party who issues—remains.

V.

The statement of the Appellee as to the former war revenue law.

On page 36 the appellee attempts to distinguish the two War Revenue Acts.

We think it certainly is not too much to say that he wholly fails to do so.

And as to one point there is an erroneous statement which is of importance, as follows:

> "But more than this, by a separate section of the Act, the companies were directly required to affix the stamp."

The language of the original statute upon this point is as follows:

> "Without delivering to the consignor thereof a printed receipt having stamped or affixed thereon a stamp denoting the duty imposed by this act, *or* without affixing thereto an adhesive stamp or stamps denoting such duty."
>
> Laws 1862, Chap. 119, Sec. 105.

In other words, a distinct alternative was provided by the act, and the companies had the option either of affixing the stamp themselves or of delivering a receipt having upon it the stamp in question; *and there was no provision anywhere as to who should pay for the stamp.*

And yet it was, as we have already shown, considered by all parties, even by the Express Companies themselves, that the former statute imposed the tax upon them.

There is absolutely no valid ground upon which the two laws can be distinguished; and it is beyond question that the present act was formed upon the old one, and should be interpreted in its light.

VI.

The authorities cited by the appellee.

Especial reliance seems to be placed upon the cases cited in pages 13 to 16 of its brief.

Of this the principal one is the *State Freight Tax Case*, 15 Wall., 232.

This case, however, so far from being an authority in favor of the appellee is of importance in establishing our own contention.

The language cited on pages 14 and 15 of the answering brief does not lay down, as the appellee suggests, the broad proposition that any tax intended to be levied upon a common carrier may at his will be shifted upon the shipper.

The proposition which is enunciated is that *the particular tax then under consideration* might be shifted by the carrier upon the shipper.

And the particular tax then under consideration had, in the preceding portion of the Court's opinion, *been expressly held not to be a tax upon the carrier, but to be intended to be imposed upon the shipper;* and in reaching this conclusion the Court was largely influenced by the existence in the tax statute of just such a provision as that which we have alluded to in our principal brief as existing under the former railway gross receipt tax law—*i. e.*, the provision permitting carriers to increase their rates by the amount of the tax levied.

As to this, the Court said:

> "Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the Treasury, and which authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. *It carries the tax over beyond the carrier to the thing carried.*"

Since, therefore, it is clear that the question as

to the party upon whom such a tax is intended to be laid depends largely upon the existence or non-existence of a special authority to the carrier to transfer the tax to its customers, and since no such provision exists in the present statute, it is submitted that the argument upon this point in our principal brief receives great emphasis from the authority relied upon by our adversaries.

It is interesting to also note in this connection that a similar provision was inserted in the Statute of New York, imposing a tax upon the masters of vessels, based upon the number of passengers which they might land, but expressly allowing the masters to collect this tax over from the passengers. This was the Statute under which the celebrated *Passenger Case*, 7 How., 283, arose, and the form in which it is drawn is an additional argument in support of our contention.

Before leaving this point, we wish to call the Court's attention particularly to the case of

Commonwealth v. *The Railroad Company*, 145 Pa. St., 38,

decided in 1891 by the Supreme Court of Pennsylvania, it being from Pennsylvania that the State Freight Tax Case relied upon by the appellee came to this Court.

In the decision above mentioned the State of Pennsylvania imposed a gross receipt tax upon corporations owning lines and collecting tolls for their use. This was attacked by them as being unconstitutional, and the question arose as to the meaning of the law, and the party by whom the burden was intended to be borne, and as to the right of this party to transfer the obligation at will upon others.

As to this point the Court said :

> " It is certainly not a tax direct or indirect upon the toll-paying corporation, for the State demands nothing from it on this account. The

demand is solely upon the toll-receiving corporation, and, if it be that the burden lies upon the toll-paying corporation, it must be because the price which it may be asked to pay as such toll may be increased by reason of the tax imposed upon the receiving corporation. *But the latter has no power of itself to shift the burden upon the other. This may, of course, be done by agreement. But the making of such agreement is optional with the two corporations, and otherwise the tax lies where it falls.* It seems to us, therefore, that as the tax upon the toll does not either by force of the statute itself, or by the necessity of the case, reach the toll-paying corporation, it cannot be said to lay a burden upon the business done by that corporation."

In other words, we have here a definite reaffirmance by this Court of the principle which we have outlined more in detail in our main brief, to the effect that *only by voluntary agreement* can a carrier shift upon the shoulders of another a burden which the Legislature has intended to place upon it alone, and that in the absence of such an agreement it cannot by its own act effect its own release.

In *Crandall* v. *Nevada*, 6 Wall., 35, the tax was expressly imposed upon the individuals traveling, as was held by this Court, and the decision has no application whatever to the case at bar.

The other cases cited need no special attention. In none of them does there appear anything adverse to the positions which we have taken.

Almost without exception they were cases involving the question of constitutionalty of taxing Acts. In none of them, so far as we have been able to find did any question between a shipper or

a citizen on the one hand, and a carrier on the other, arise.

And we have searched in vain in the opinions for any statements which would even tend to support the right now claimed by the appellee, to shift, of its own volition, upon the shoulders of another, burdens intended to be placed upon it alone.

VII.

As to Penalties.

Our adversary appears to be under a misconception, on page 28, in stating that our main reliance appears to be placed upon the penalty clause in the express paragraph.

These provisions as to penalties are all indicative of the intention of Congress as to the person by whom the act was intended to be done, and we have alluded to them merely in that connection as showing that in all cases penalties were imposed upon the carrier and not upon the shipper.

VIII.

As to the Tax being a Regulation of Commerce.

On page 23 our adversary has construed our principal brief as attempting to support our contention on the theory that the War Revenue Act was an act regulating commerce. This is erroneous.

We have alluded in our brief to the presumptions established in many cases in which regulative statutes were considered, as analogous to those which must apply here.

But we did not base our argument at all upon the claim that this statute is anything other than it purports to be, to wit, a tax act, and that Congress has power to place this tax where it will.

IX.

As to the absence of any franchise in the Appellee.

On pages 19 and 20 of its brief, some stress is laid upon the fact that the present appellee enjoys no franchise, being simply a joint stock association.

It is thus argued that there is no particular reason why any particular tax should be levied upon it.

It must be kept in mind, however, that the question certified is not limited to this particular appeal, but applies to all carriers.

And it is a fact too clear for argument that of the railways, steamboat companies, express companies, and other carriers doing business in the United States by far the greater portion are corporations not only exercising the franchise of being corporations, but also availing themselves of franchises in the highways of the United States, or of the right to take private land for their purposes by the exercise of the right of eminent domain.

And since the duties of all classes of carriers are bound together in this one paragraph, it follows that any answer to the question certified will affect not merely the present appellee, but every other carrier within the limits of the United States.

And as we have shown in our principal brief, if the appellee be exempted from taxation by reason of the interpretation placed upon this particular section of the Act by this Court, precisely the

same ruling will exempt from the same burden all of the immense amounts of capital engaged in the carrying business throughout the United States.

We do not, of course, mean to say that we consider the existence of a franchise of any sort necessary in order to support our argument, for we hold that the Congress of the United States has full power to impose a tax if it pleases upon any occupation and all parties engaged therein, whether or not such occupation involves the enjoyment of a public franchise.

And we also claim that in this particular instance, it has been the intention of Congress to place such a tax upon the business specified in this paragraph of the Statute.

Respectfully submitted,

FREDERIC R. KELLOGG and JAMES B. DILL.
Of Counsel for Appellant.

IN THE

Supreme Court of the United States.

WILLIAM CRAWFORD,
Appellant,

AGAINST

WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company,
Respondent.

October Term,
No. 248.

2

SOUTHERN DISTRICT OF NEW YORK, }
County of New York, } ss.:

JAMES B. DILL, being duly sworn, deposes and says: That he is of counsel for the appellant in the above entitled action, and is fully conversant with the facts of said case; that the appellant does not join in the motion to adjourn this cause, but desires that the same should be heard, if the Court will permit, on the day for which it was originally set, to wit, the second Monday of October, 1899, and requests the Court to deny the motion for the adjournment.

3

The motion papers upon this application have only been served on this 7th day of October.

JAMES B. DILL.

Sworn to before me this 7th day of October, 1899.

HENRY SCHOENHERR, Jr.,
Notary Public,
Kings County.
Certificate filed in New York Co.

[SEAL.]

SUPREME COURT OF THE UNITED STATES

October Term, 1916.

William Crawford,
Appellant,

against

William L. Saxbell, as Treasurer of the Adams Express Company,
Appellee.

Term,
No. 148

BRIEF IN BEHALF OF HAMILTON-BROWN SHOE COMPANY AND OTHERS

PRESENTED BY LEAVE OF THE COURT

HARVEY L. GRIFFITH
Of Counsel

Supreme Court of the United States.

WILLIAM CRAWFORD, Appellant,	
AGAINST	17,345. October Term 1899.
WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company, Appellee.	No. 248.

BRIEF PRESENTED BY LEAVE OF THE COURT IN BEHALF OF HAMILTON-BROWN SHOE COMPANY AND OTHERS.

By leave of Court duly obtained, The Hamilton-Brown Shoe Company and others, who are relators in a petition for a writ of mandamus against Wells, Fargo & Company, pending in the Supreme Court of the State of Missouri, in which action are involved substantially the issues in this cause, hereby respectfully submit the following statement, points and argument.

Statement.

The charge against the express companies is that since July 1, 1898, they, being common carriers, have continuously refused, and are still refusing to accept express packages for transportation, except upon condition that shippers attach the revenue

stamps required by the War Revenue Law to be attached to express receipts, or furnish to the companies the money with which to pay for such revenue stamps.

The sections of the United States War Revenue Law, specially relating to the issues involved, are as follows:

> "SECTION 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this Act, or for or in respect of the vellum, parchment or paper upon which such instruments, matters or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several taxes or sums of money set down in figures against the same, respectively or otherwise specified or set forth in the said schedule."
>
> * * * * * *
>
> "SECT. 7. That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the Court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any Court."

Schedule A.

* * * * *

"EXPRESS AND FREIGHT: It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and cancelled, as is in this Act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

ARGUMENT.

The express companies take the position that the War Revenue law does not, in terms, impose a tax upon them, and that even if the tax were so imposed, there is nothing in that law to prevent them from demanding of the shipper in the first instance the money with which to pay the tax. They claim, in effect, that while the Federal Government has expressly imposed a tax on the transaction between

the express company and the shipper, the question as to who shall pay the tax is left open; that by the very terms of the act, it may be paid by either of the parties.

Our answer is: 1st. The Revenue Law expressly requires the companies to pay the tax. 2d. While that statute does not forbid the collection of the money from the shipper wherewith to pay the tax, another law, which is of binding force, does forbid its collection by the method which the companies have adopted.

The revenue law does not, either positively or negatively, point out the sources from which the persons taxed are to get the means with which to pay the taxes. It is silent on this point, and revenue laws generally are silent on this point.

POINT I.

The War Revenue law in terms imposes the tax in question upon express companies.

If it be admitted that the tax is on the *transaction*, as claimed by the companies, it may still be true that the obligation to pay rests upon some specific person. The Congress realized that the transaction in question was one to which the express companies, as common carriers, were required by law to become parties if the public wished to become shippers. The case was not one of simple contract, as in the sale of land or stock. If the merchant wanted his package shipped, the express company was obliged to receive it and carry it to its destination. This duty of the carrier is imposed by law, and grows out of the relation sustained by the carrier to the public. Congress was legislating in respect to this situation.

Here was a transaction it would be well to tax, and the stamp tax seemed to be the best form of taxation. What, then, could be stamped? Usually, there was a memorial of the transaction in the form of a receipt given by the express company to the shipper. This memorial was usual, but it was not necessary. So far as the law was concerned, the parties might agree to omit this customary memorial of the transaction. It seemed necessary, therefore, that Congress should require the issuance of a receipt as written evidence of the transaction, in order that there might certainly be a document in every case to which a revenue stamp might be affixed.

By state law, there was already a legal obligation on express companies to receive and carry express matter duly tendered for carriage, and now by Federal law there was a new legal obligation imposed, requiring the company to issue a receipt to the shipper for every package received.

In order that the further purpose of Congress, viz., the collection of revenue, might be accomplished, there was the additional requirement that every receipt so issued should have a one cent stamp affixed to it, and that the same should be duly canceled.

Here, then, are several distinct legal obligations: 1st. Express companies must receive and transport packages duly tendered. 2d. They must issue receipts in every case. 3d. To every receipt must be affixed a stamp, and the stamp must be duly canceled.

By the practice of the companies, they seem to concede their obligation to affix and cancel the stamps. They *do* affix and cancel them. It would seem that they merely insist that they are not under legal obligation to pay for them. In the view of the companies, it is clearly one thing to affix and cancel a stamp, and another things to pay for the stamp.

The interesting inquiry now, is this: Is the legal

obligation imposed by Congress on the companies broad enough to include the requirement that they shall pay for the revenue stamp which must be affixed to the receipts they issue?

Ordinarily one would think that a law requiring a person to affix a revenue stamp, includes the requirement that such person shall pay for it.

It might also well be supposed that if one made it a practice to affix and cancel revenue stamps, he considered the affixing and cancellation of the stamp a legal duty.

But let the statute itself be interpreted.

We do not look to the Express and Freight paragraph in Schedule A to find the provision imposing the duty to pay the express tax. The object of that paragraph is to impose the duty of issuing the receipt, and, furthermore, to fix the amount of the tax to be paid upon the transaction.

The first paragraph of Section 6 of the Act, having reference to the entire catalogue contained in Schedule A, makes the provision which is decisive of the point in question.

Omitting words which need not be considered in this connection, the substantial provision of Section 6 is: That for and in respect of each document or instrument mentioned and described in Schedule A, the several taxes set forth in that Schedule shall be paid by the person who makes, signs or issues such document or instrument (or by the person for whose use or benefit the same is made, signed or issued).

And Section 7 provides that if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax imposed by the act, or without having thereupon an adhesive stamp to denote said tax, such person shall be deemed guilty of a misdemeanor, and such unstamped instrument, document or paper shall not be competent evidence in any court.

As above stated, the purpose of the paragraph in

Schedule A referring to Express and Freight, was to impose the duty of issuing a receipt, in the case of every shipment, and to prescribe the amount of the tax. The purpose of that paragraph was not to designate the person who should be liable to pay the tax. It was wholly unnecessary to designate in any paragraph in Schedule A the person or persons who should be liable to pay the tax on documents.

It will be observed that, in the main, Schedule A is a catalogue of various kinds of documents and instruments, showing, in connection with each document or instrument, the amount of tax imposed upon it. The whole schedule is to be read with reference to the first paragraph of Section 6, which provides, in general terms, that in respect to each and every document named in that schedule, the prescribed tax shall be paid by the person making, signing or issuing the document, or by the person for whose use or benefit the document is made, signed or issued. There is no force, therefore, in the point made by the companies that in the paragraph of Schedule A, entitled, "Express and Freight," an impersonal form of expression is used in connection with the imposing of the duty to affix and cancel the stamp, to wit, the expression "and there shall be duly attached and canceled to each bill of lading, &c., a stamp." There is no significance to be attached to the impersonal form of expression. Two things are to be remembered in this connection: first, there was no occasion to use the personal form of expression, because Section 6 had already pointed out what person should be liable to pay the tax imposed, and, second, in connection with the impersonal form of expression, is the phrase "as is in this act provided"—clearly indicating that in another place the Act provides, once for all, how and by whom the required stamps shall be affixed and canceled.

When in Schedule A the subject of telephone messages is reached, since no documents are made ordinarily in connection with such messages, and it

seemed impracticable to require documents to be made in connection therewith, the tax upon the messages is placed directly upon the person, firm or corporation owning or operating the telephone line. This provision indicates clearly that it was in the mind of Congress to tax these quasi public corporations in respect to their very profitable transactions with the people. In the case of the Telephone Company, there was usually no document issued, and the Act required none; hence it became necessary to provide in Schedule A that as to these transactions the tax should be paid by the company. In the case of the Express Company, on the other hand, there was usually a document issued, and the Act required the issuance of one; hence there was no necessity to make provision in Schedule A for the payment of the express tax, since it had already been provided in respect of all documents named in that schedule that taxes in respect to the same should be paid by the persons signing, making or issuing them.

The companies have not overlooked Section 6. They cannot eliminate it and they cannot ignore it. They, therefore, in the true spirit of philosophy, seek to extract comfort from it.

We quote a few words from a memorandum prepared by Messrs. Carter & Ledyard, of New York, in behalf of the express companies. They say:

> "We have yet, however, to refer to the controlling provision of the Act, which leaves this matter no longer one of construction, but which declares in express terms that the tax may be paid indifferently either by the carrier or the shipper.
>
> Section 6 provides: "That on and after the first day of July, 1898, there shall be levied, collected and paid (for and in respect of the several bonds, debentures or certificates of stock and of indebtedness and other documents, instruments, matters and things mentioned and described in schedule A of this Act, or for or in respect of the vellum, parchment or paper upon which said instruments, matters or things, or any of them, shall be written or printed) by any person or persons or party who shall make, sign or issue the same, *or for whose use or benefit the same shall be made, signed or issued*, the several taxes or sums of money set down in figures against the same respectively, or otherwise specified or set forth in said scedule.'
>
> The parentheses are our own. They are inserted to make the sense appear more clearly. This provision is a clear and unmistakable enactment to the effect that all the stamp taxes upon documents mentioned in schedule A shall be paid either by the person who issues the document—that is, the carrier—or by

> the person for whose use and benefit the same is issued—that is, the shipper.
>
> What more can be said? This provision is in complete accordance with the general and essential nature of such taxes. As was said in the early part of this memorandum, they are not imposed upon any particular persons or occupations. They are taxes upon commercial and business transactions which are evidenced by, or which consist of, documents. To each of such transactions there are of necessity two parties—one who makes the document, and the other for whose use and benefit it is made. The object of the government is revenue. The subject of the tax is the transaction; but it is a matter of absolute indifference to the government whether the cost of the tax is paid by one or the other party. So long as it receives the revenue from the transaction it is content. And the whole Act bristles with indications of this attitude of the government, namely, its complete indifference as to which party to the transaction pays the tax."

It cannot be seriously argued that the words "persons for whose use or benefit the document shall be made, signed or issued," are intended to designate shippers in their relations to express companies. These words are very familiar in the law. They are by no means strange or unusual terms.

If two persons have a transaction involving the delivery by the one to the other of a document, whether the same be a promissory note or deed or other contract, or a receipt, it cannot with any accuracy be said that the person receiving the document is the one for whose use and benefit it is issued. In such a connection the expression is utterly without force or meaning. These words are not used in legal terminology to import such a notion. They are words of *representation*, and do not apply to an *adversary* relationship. If one acts for another's use and benefit, he at least acts *for* that other—*on behalf of* that other.

A trustee acts for the use and benefit of a *cestui que trust*, but a grantor never acts for the use and benefit of a grantee. This is true, in a strictly legal sense, no matter how useful or beneficial a deed may be to the grantee. The transaction of sale, which goes to the essence of the deed, may be every whit as useful to the grantor as to the grantee, and more so.

The only *apparent* exception to the rule for which we are contending, is found in the case of Custom

House entries and manifests, the tax on which is doubtless payable by the owners of the goods. But here we have what might be called a unilateral transaction, involving no adversary relationship.

When Congress provided that the tax in question should be paid by the person signing the document, or by the person for whose use or benefit the document should be signed, one main purpose was in the mind of the lawmakers, viz., to lay the burden of the tax upon the principal, whether he actually made and signed the document himself, or made and signed it by an agent. The principal is the person for whose use and benefit an agent makes, signs and issues a document in connection with his principal's business.

Carrying out this idea, Section 7 provides that if any person shall make, sign or issue, or, *cause to be* made, signed or issued, any document without the stamp required by the Act, he shall be guilty of a misdemeanor. It is the principal in the case who is aimed at, whether he himself or his agent signs and issues the document. Section 7 construes the words "for whose use or benefit" employed in Section 6. Manifestly the person for whose use or benefit a document is signed or issued, referred to in Section 6, is the same person as the one who causes the document to be signed or issued, as the expression is in Section 7. The two are closely connected. Section 6 imposes upon certain persons the duty of paying a tax. Section 7 declares that if those persons evade payment, they shall be guilty of a misdemeanor. In the one section, the persons on whom the duty is imposed are described as the persons who sign or issue the documents, or for whose use or benefit the documents are signed or issued. In the other section, the very same persons are described as the persons who sign or issue the documents, or who *cause* the documents to be signed or issued. Persons who cause documents to be issued are principals acting through agents. It is equally true that those for whose use or benefit documents are issued are principals acting through agents.

Instead of saying, therefore, with Messrs. Carter & Ledyard, that the person who signs the express receipt is the carrier, and the person for whose use or benefit it is signed is the shipper, we ought to say that the person who signs is the carrier, and the person for whose use or benefit the signing is done, is likewise the carrier, represented, in the latter case, by an agent.

This interpretation of the words " for whose use or benefit " involves us in no contradictions or absurdities. Principals and their agents do not stand in adverse relations to each other in connection with the business of the principal which the agent conducts for him. It is reasonable to say that when an agent conducts a transaction for his principal, and there is a tax on the transaction, the principal shall pay it. In connection with a provision in a statute that one who makes, signs or issues a document, shall pay a tax thereon, it is reasonable to provide that if an agent makes, signs or issues the document, then the principal, for whose benefit he does it, shall be liable to pay the tax.

But it is wholly unreasonable to say, in a statute designed to fix a liability to pay a tax, that it shall be paid by the one party to the transaction, or by the other party to the transaction, especially where the particular transaction is one which, by law, one of the parties is bound to enter into, if the other party wishes it.

So evident is the intent of Congress to impose the tax on the person or company making, or causing to be made, the document, that in the paragraph of Schedule A relating to bills of exchange and promissory notes, it is provided that the provisions of this paragraph shall apply to original domestic money orders issued by the government of the United States. If the provisions apply to these money orders, who furnishes the stamp? The answer is: The government. But in order to make the provision effective to add to the government's revenue, it is instantly provided, furthermore, that the price of

the money order shall be increased by a sum equal to the price of the stamp. But the person to whom the money order is issued pays, not the tax, but an increased price for the money order.

Now, the obligation of the government to provide the stamp flows from the requirement of the Act that the provisions of the paragraph relating to bills and notes (having necessary reference always to Section 6), shall apply to money orders issued by the government.

The government does not pretend that the person for whose use or benefit a document, as, for example, a money order, is made, signed or issued, is the person to whom the same is issued and delivered.

Moreover, one of the chief purposes of Section 6 was to designate the person who should be liable to pay the tax. It may be true, as the companies insist, that the government is not concerned with the question as to who shall pay a given tax, so it is paid. But the government, in imposing a tax, will take care to fix upon a definite person the liability to pay it. The evident purpose of Section 6 of the Revenue Act is to accomplish this. But if the contention of the companies be correct, Section 6, while seeming to designate, does not, in truth, designate at all.

This section provides that the tax shall be paid by the person who makes, signs or issues the document, or by the person for whose use or benefit the document is made, signed or issued. In our view, the meaning of this provision is that the real maker of the document shall in any case pay the tax, whether he acts by himself or by his agent. The express companies argue that there are two parties to the various transactions represented by the documents named in Schedule A, and that the true meaning of Section 6 is that the tax is imposed, not upon the one party rather than the other, but indifferently upon either. Then, according to their contention, the solemn purpose of Congress, in employing this phraseology, was to enact that the tax should be

paid by the one party to the transaction or else by the other party to the transaction.

It seems to us unlikely that Congress would employ words manifestly intended to fix liability upon a definite class of persons, if it had no intention to fix the liability at all. If, as the companies contend, the intention of Congress was to leave the whole question of liability open, then there was surely no need of a provision in the law that the tax should be paid indifferently by the one or by the other of two adverse parties to the transaction.

The question whether A is solely liable to pay a given tax on a particular transaction is one thing. The question whether he may not reimburse himself by collecting the amount of the tax from the other party to the transaction, under a purely voluntary agreement with the latter, is quite another thing.

It may be freely admitted that, in the case of documents which the maker is not legally bound to issue, the amount of the tax may be demanded of the person to whom the document is to be issued, as a condition of the transaction. If the demand is refused, the only consequence is that the transaction fails, and this is not unlawful.

But this is not equivalent to saying that the duty to pay the tax rests, as a matter of law, indifferently upon either the one or the other of the parties to the transaction.

The burden may *ultimately* be made to fall upon the one or the other, according to the agreement of the parties, but the Government looks to the *maker of the document* for the tax.

If there be a legal obligation to issue a document (as, for example, a deed in pursuance of a binding contract to execute and deliver the same--or a lease in pursuance of a binding contract to renew an existing lease), then surely the law determines between the parties, whether the document (as, for example, the deed or the lease), under the contract

importing the obligation, shall be a stamped or an unstamped document, in the absence of any agreement between the parties as to which of them shall bear the ultimate burden.

Can he who is bound by contract to make and deliver a deed refuse to deliver a stamped deed upon the plea that the deed is *for the use and benefit* of the other party, and that therefore it is no more the duty of the grantor than of the grantee to furnish the stamp?

Where A makes a sale of land to B, and a deed is made as a memorial of the transaction, is it not idle to speak of the deed as being for the use and benefit of the one party rather than of the other party, in a legal sense?

For whose use or benefit is the transaction itself, to wit, the sale of the land? Presumably, for the use and benefit of both parties, in the ordinary sense of the terms, as distinguished from their legal significance?

The same is true of the deed, which is only the written evidence of the transaction. It must be remembered that these words, in their legal sense, would not be used at all in referring to such a transaction.

It may therefore well be said that, in every case, the party who makes and issues a document requiring a stamp (whether acting personally or by an agent or trustee) is bound, as between himself and the Government, to pay the stamp tax thereon.

If he is *under no legal obligation* to make and issue a given document, he may refuse to issue it, unless the other party to the proposed transaction will furnish the money wherewith to pay the tax.

If, however, he is *under a legal obligation* to make and issue a given document, and the same requires a stamp, then he may not lawfully demand the amount of the tax of the other party (entitled to receive the document) as a condition of issuing it.

Express companies are under a legal obligation to make and issue receipts, and therefore they cannot

lawfully demand of a shipper payment of the amount of the tax, as a condition of performing their legal obligation, already complete, to deliver a valid receipt upon due tender of the express package and the transportation charges.

POINT II.

Not the war revenue law, but the law of the State, forbids the express companies to compel shippers to pay the war tax on express shipments, as a condition of acceptance for transportation.

The Revenue Act, so far as it provides for stamp taxes on transactions evidenced by documents, takes effect only in case the transactions are had. There is nothing in the Act compelling persons to have any sort of transactions with one another. The transaction of selling land is taxed by the Act. A deed is always given as a memorial of this sort of transaction, and the deed must be stamped. But there is nothing in this particular law, or in any law, compelling men to sell or to buy land. The transaction by which a carrier receives from a shipper for transportation a package of merchandise is taxed by the Act. Under the Act, a receipt must be given by the carrier to the shipper, and this receipt must be stamped. There is nothing in this particular law compelling either shipper or carrier to have this sort of transaction.

But now appears the difference between this sort of transaction and the transaction of selling land. The common law and the statutes of many of the States (without any regard to the War Revenue Act) compel the carrier to receive from the shipper,

for transportation, his package, when the shipper makes proper tender.

There is no comfort for the express companies in the opinion given by the Attorney General of the United States that "in controversies arising between shippers and express companies as to which one shall be required to bear the expense of the stamp, the Government has no direct concern under the War Revenue Law."

There is no more comfort for them in the opinion given by Commissioner Scott, in which he said: "If the carrier refuses to accept the goods for transportation, except on condition that the owner or shipper shall pay the sum necessary to purchase the stamp, or stamps, in addition to the customary charge for the transportation, the War Revenue Law provides no remedy, nor does any internal revenue law. It would seem that in such cases the aggrieved parties must depend upon the common or statute law of the State defining the obligations of common carriers."

This statement of Commissioner Scott's is an accurate statement of the situation.

In terms, the revenue law only requires the express company to issue a receipt to the person from whom the goods are accepted for transportation. If there were no other law in the case but the revenue law, the express companies might well say to any person offering goods for shipment: "Your goods will not be accepted for transportation unless you furnish the price of the stamp, which must be affixed to the receipt which we are compelled to issue to you upon acceptance of your goods."

If there were no law affecting the case but the revenue law, the companies might say to persons tendering goods for shipment: "Your goods will not be accepted for transportation unless you first pay the cost of printing or lithographing the receipt which, under the law, we are compelled to give you when we accept your goods."

Any condition might be imposed on the shipper by the carrier (as any condition may be imposed upon the would-be buyer of land by the seller in advance of the sale), if there were no law controlling the parties, except the War Revenue Law.

This attempted exaction from the shippers of money with which to pay taxes, as a condition of accepting goods for shipment, is no less unlawful than an exaction of money with which to pay any other specific expense of the company as a condition of acceptance of goods for shipment.

If the express companies will obey the law of the State, which commands acceptance of goods for transportation upon tender of the rate, then the War Revenue Law will at once become operative. When the goods are once accepted for transportation, then follows the obligation under the revenue law to issue a receipt, and the further obligation to affix a stamp to the receipt. In order that there may be no doubt as to who is bound to perform this latter duty, the Act specifically provides that it shall be done by the party issuing the receipt, or (according to our interpretation), in cases where agents issue the receipt, by the principal for whose use or benefit the agent acts.

POINT III.

It will not avail the express companies to claim that they have merely exercised their right to advance rates.

The final position taken by the express companies has been thus set forth by their legal exponents: "It would make little difference in fact, if the statute had, in express terms, required the carrier to affix the stamp and pay for it. The effect of such a

burden would simply have been to increase the cost of carriage and the carrier would have an undoubted right to raise his rates to meet such increased cost. In view of this consideration, the discussion in which various merchants' associations have indulged, as to whether the Act intends to impose upon the express companies the duty of paying the tax, becomes purely academical. If they were right, it would not avail them, for the answer is that the carrier has simply raised his rates, and has demanded an increase of his compensation for the carriage equal to the increased cost—a thing which he has a very clear right to do."

If, then, we are right in all our foregoing conclusions, we have gained nothing. Our argument is purely academical. The express companies have simply raised their rates.

It may be worth while to offer a mild protest against this peremptory disposition of the shippers' rights.

The express companies have not raised their rates.

The one cent demanded of each shipper is not demanded as part of the rate. The agents of the companies do not pretend that this special charge is part of the rate. Indeed, it has been urged by the companies that since they were under contract to pay about 45 per cent. of their gross receipts from express charges to the railroad companies, it would be less burdensome to shippers, and the public generally, to pay the war tax on express packages directly, by furnishing the stamps, than to have the rates increased to cover the cost of the stamps. The argument is that if the rates were raised it would be necessary to increase the revenues of the companies by about twice the amount of the tax, since about half the increase would be payable to the railroad companies under their contract with the express companies.

Furthermore, assuming the rates as they existed prior to July 1st to have been reasonable, it is not

reasonable to increase all rates by the uniform addition of one cent to each particular rate.

This method of increase cannot be successfully defended on the ground that each particular shipment costs the express company just one cent more than it cost before the War Revenue Law went into effect. As between the United States and the express company, the significant fact is not the one cent stamp on each particular receipt. The significant thing is the aggregate revenue to the government and the aggregate expense to the express company. The benefit to the one and the burden to the other are measured, it is true, by the number of express packages shipped, reckoning the amount to be paid at the rate of one cent per package, but the only consideration which is of serious importance to either party is the aggregate tax. If the law had provided that the companies should pay to the government a tax, the amount of which should be ascertained by dividing the whole number of packages shipped by 100, and by expressing the result in terms of dollars, the companies and the government would have the same situation to deal with that actually exists under the law as it is.

From the government's standpoint the true reason for the stamp tax in the form in which it is imposed is that it means quick revenue, since the stamps must be bought in advance of the transactions which are taxed; and, in the second place, the difficulties of inspection are reduced to a minimum.

The stamp tax is preferable to a tax on gross revenues, for the reason that the payment of the latter tax must await the earning of the revenues, and the computation must, in the nature of the case, be left largely in the hands of the persons taxed.

When we come to the question of reimbursing the express companies, it must be remembered that their relation to shippers is largely determined and regulated by law. The shipper is not required to pay the carrier anything beyond the rate charged for the carriage, and for such other service as is ren-

dered by the carrier in connection with the carriage. Rates must be reasonable, and they must bear a more or less definite relation to the value, bulk and weight of packages, and to distances between points of shipment and points of destination.

Rates on particular packages do not, and should not, bear any definite relation to specific items of expense which the carriers may have to incur in connection with the shipment of such packages.

Both by custom and by law, express matter is classified, and a tariff of rates based on distance is applied to the classification. The theory of rate-making is that the classifications and rates must be so determined as to produce revenue sufficient to pay all expenses, including probable losses, and to pay a reasonable profit on capital. Not specific items of expense, but the aggregate expenses, constitute the prime factor in the problem of estimating the necessary revenues of carriers.

Certainly the addition of a uniform sum to every rate, as by increasing a rate from 25 cents to 26 cents, and another rate from $5.00 to $5.01, and so on throughout the whole schedule, could not be considered as a fair or reasonable method of increasing the general revenues to meet the increased general expense.

Respectfully submitted,

HARVEY L. CHRISTIE,
Of Counsel for Hamilton-Brown Shoe Co. *et al.*

No. 10

UNITED STATES SUPREME COURT

WILLIAM CRAWFORD,

Complainant-Appellant,

against

WILLIAM L. RUSSELL, as Treasurer of the Adams Express Company,

Defendant-Appellee.

PAPERS ON MOTION TO REMAND TO STATE COURT.

BILL, BRYSON & BALDWIN,

Solicitors for Complainant-Appellant,

[illegible] Street, New York.

James B. Dill,

Of Counsel.

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Supreme Court,

CITY AND COUNTY OF NEW YORK.

WILLIAM CRAWFORD, Plaintiff, AGAINST WILLIAM L. HUBBELL, as Treasurer of The Adams Express Company, Defendant.	Petition on Removal.

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The petition of William L. Hubbell, treasurer of The Adams Express Company, the above named defendant, respectfully shows to this Honorable Court:

I.

Your petitioner, who is the defendant in the above entitled suit, was at the commencement thereof and still is a citizen and resident of the State of Connecticut; and the above named plaintiff was at the time of the commencement of the above entitled suit and still is a citizen and resident of the State of New York.

II.

This suit is a suit of a civil nature in equity, wherein the matter and amount in dispute exceeds, exclusive of interest and costs, the sum and value of five thousand dollars ($5,000), and arising under the

Constitution and laws of the United States, and particularly under an Act of Congress providing Internal Revenue, entitled "An Act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898, which facts appear by the complaint in said suit, a copy of which is hereto annexed, marked "Schedule A," and reference thereto is prayed as a part of this petition, as fully as if here set forth.

III.

The matter in dispute in this suit is whether the said Act of Congress, entitled "An Act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898, imposes upon The Adams Express Company and requires it to pay the stamp tax therein provided for, of one cent upon every bill of lading or receipt issued by said express company for goods accepted by it for transportation.

The plaintiff contends that such tax is by said law imposed upon said express company; that by said law it is made the duty of said express company to affix said stamps to said bills of lading or receipts, and to pay said tax; and that said express company may not lawfully insist that the plaintiff and other shippers of express packages over its lines shall provide or pay for the stamps to be affixed to such bills of lading or receipts.

The defendant contends that such tax is not by said law imposed upon said express company, and that the said express company may lawfully insist that the plaintiff and other persons desiring to ship express packages over its lines shall provide or pay for such stamps before the said express company can lawfully be required to accept such packages for transportation; and that the said express company may lawfully demand and collect from the plaintiff and other shippers desiring to ship express packages over its lines the amount of the cost of said stamps in addition to its usual and reasonable rates, as

demanded and received by it from the plaintiff and 7
other shippers prior to July 1, 1898, when said Act of Congress so far as concerns said stamp tax took effect.

The number of express packages ordinarily shipped over the said The Adams Express Company's lines exceeds ninety thousand of such packages per day, or more than twenty-eight million of such packages per year, and if it should be decided, as the plaintiff contends, that the said stamp tax is by said law of Congress imposed upon the said express company, and that it is the duty of said express company to pay the same, the said express company would be required to pay therefor more than $900 per day, and more than $280,000 per year. The 8
matter or amount in dispute in this suit is the value of the right claimed by said The Adams Express Company to require the plaintiff and other shippers of express packages over its lines to provide or pay for said stamps, and the value of such right is more than $280,000 per year.

IV.

This suit was commenced by the service of a summons and complaint, notice of motion for injunction and affidavit on your petitioner, the defendant above named, on the eighteenth day of August, 1898. Your petitioner has duly appeared in said 9
suit, and your petitioner's time to answer or plead to the said complaint will expire on the seventh day of September, 1898, and your petitioner is not required by the laws of the State of New York, or by any rule of the State Court in which this suit is brought, to answer or plead to the said complaint. No answer, demurrer or other pleading on behalf of the defendant has yet been served in said suit. There has been no trial of this suit in this Honorable Court, and no term of this Court at which this suit could be tried has been held since the same was commenced.

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V.

Your petitioner desires to remove this suit into the Circuit Court of the United States for the Southern District of New York, where this suit is pending, in pursuance of the Acts of Congress and the statutes of the United States in such case made and provided.

VI.

Your petitioner has made and herewith files a bond with good and sufficient surety for his entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record
11 in this suit, and for paying all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed or transferred thereto, and also for there appearing and entering special bail in this suit, if special bail was originally requisite therein.

VII.

Your petitioner therefore prays this Honorable Court to accept this petition and said bond, and to proceed no further herein, except to make the order of removal required by law, and to accept and approve this petition and the bond and sureties filed
12 herewith, and to cause the record in this suit to be removed into the Circuit Court of the United States for the Southern District of New York, in which District said suit is now pending.

And your petitioner, as in duty bound, will ever pray, &c.

Dated New York, August 25, 1898.

SEWARD, GUTHRIE & STEELE,
Attorneys for Petitioner,
40 Wall Street,
New York City.

STATE OF NEW YORK, }
City and County of New York, } ss.: 13

CHARLES STEELE, being duly sworn, doth depose and say: That he is a member of the firm of Seward, Guthrie & Steele, attorneys for the above named petitioner; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. That the reason why this verification is not made by the petitioner is that the petitioner is not within the City, County or State of New York. That deponent is also Secretary of The Adams Express Company, and that the sources of deponent's 14
knowledge and information in regard to the statements contained in the foregoing petition are his familiarity with and knowledge of the affairs of said The Adams Express Company by reason of his position as Secretary thereof, and also statements made to him by the President of said The Adams Express Company, and an inspection of the various papers and records of the company in connection therewith.

CHARLES STEELE.

Sworn to before me this 25th }
day of August, 1898. }

JOHN J. DALY,
Notary Public, 15
Kings Co.
Cert. filed in N. Y. Co.

16

Schedule "A."

SUPREME COURT,

COUNTY OF NEW YORK.

WILLIAM CRAWFORD, Plaintiff, AGAINST 17 WILLIAM L. HUBBELL, as Treasurer of the ADAMS EXPRESS COMPANY, Defendant.	Notice of Motion for Injunction.

Take notice, that upon the summons in this action, and the complaint herein and the annexed affidavit of William Crawford, both verified on the 17th day of August, 1898, a motion will be made at a Special Term of this Court, Part I. thereof, in the Court House, in New York City, on the 30th day of August, 1898, at 10.30 o'clock in the forenoon, or as soon thereafter as coun-
18 sel can be heard, for an order by which the defendant and the said Adams Express Company, its agents, employees and servants, shall be enjoined, restrained and prohibited, pending the determination of this action, from refusing to accept and receive for forwarding and transportation the package tendered for forwarding and transportation mentioned in the complaint, upon the prepayment or offer to prepay the regular and established charges for such forwarding and transportation, to wit, the sum of thirty-five (35) cents.

That they, and each of them, be enjoined, restrained and prohibited, during the pendency of this

action, from refusing to accept and receive for for- 19
warding and transportation, and from refusing to forward and transport, any other package or packages of the kind and character which the said Adams Express Company is accustomed to forward and transport, and of the kind and character of which the said Adams Express Company holds itself out to the public as a common carrier, when the offer or tender of such package shall be accompanied by the prepayment or offer to prepay the regular and established charges of the said Adams Express Company for such forwarding and transportation, exclusive of the United States Revenue stamp required by the Act of Congress, approved June 13, 1898, to be affixed to the bill 20
of lading, manifest or other evidence of receipt and forwarding, and exclusive of the price, cost or value of such stamp.

That they, and each of them, be enjoined, restrained and prohibited, pending the determination of this action, from requiring of the plaintiff as a condition of forwarding or transporting any package or packages for the plaintiff, that the plaintiff directly or indirectly furnish or pay for the United States Revenue stamp required by said act to be affixed to the bill of lading, manifest or other evidence of receipt and forwarding.

That they, and each of them, be enjoined restrained and prohibited, during the pen- 21
dency of this action, from requiring of the plaintiff or any of its consignees, as a condition of the forwarding and delivery of any package that the plaintiff or such consignee directly or indirectly furnish or pay for the United States revenue stamp required by said act to be affixed to the bill of lading, manifest or other evidence of the receipt and forwarding.

That they, and each of them, during the pendency of this action, be enjoined and required to accept and receive for forwarding and transportation, and to forward and transport for the plaintiff, any pack-

22 age or packages of the kind and character they are accustomed to forward and transport, and of the kind and character of which they hold themselves out to the public as common carriers, at the regular rates established by them prior to the first day of July, 1898, and without requiring from the plaintiff that he furnish or pay for the United States revenue stamp required by said act to be affixed to the bill of lading, manifest or other evidence of the receipt and forwarding.

That they, and each of them, during the pendency of this action, be enjoined, restrained and prohibited from requiring of the plaintiff as a condition of the plaintiff's employing the
23 Adams Express Company as a common carrier that the plaintiff or its consignee directly or indirectly furnish or pay for the United States revenue stamp or stamps required by said act to be affixed to the bill of lading, manifest or other evidence of the receipt and forwarding either as a separate and distinct charge forforwarding and transportation, or by way of an increased rate for such forwarding and transportation.

That the plaintiff have such other, further or different relief as may be just, with the costs of the motion.

Dated August 17, 1898.

24 DILL, SEYMOUR & KELLOGG,
Attorneys for Plaintiff,
27 Pine Street.

To Messrs. SEWARD, GUTHRIE & STEELE,
Attorneys for Defendant,
40 Wall Street.

SUPREME COURT, 25

CITY AND COUNTY OF NEW YORK.

WILLIAM CRAWFORD, Plaintiff, AGAINST WILLIAM L. HUBBELL, as Treasurer of the ADAMS EXPRESS COMPANY, Defendant.	Affidavit for Injunction. 26

BOROUGH OF MANHATTAN, City and County of New York, } ss.:

WILLIAM CRAWFORD, being duly sworn, says: He is the plaintiff in the above entitled action; that he has read the complaint herein which is hereto annexed, and the allegations therein contained are true to the knowledge of the deponent.

That prior to the first day of July, 1898, the Adams Express Company mentioned in the complaint had fixed and established regular rates for the forwarding the transportation of packages, parcels and bundles by express, and had compiled and published a book of upwards of two hundred pages, setting forth and announcing the rates which had been fixed and established for forwarding and transporting packages, parcels and bundles to all the points reached by its system, and had furnished such books to its agents and customers, and among others had furnished one or more of the same to the plaintiff, and that the rates stated in the complaint are the rates fixed and established by the said Adams Express Company and published in said book, as appears therefrom at page 27

12, and from the Addenda thereto following page 223 which is entitled, "Graduated rates for packages weighing less than 100 lbs."

That the rates thus fixed and established by the Adams Express Company were in force for a long time prior to July 1, 1898, and were rates upon the payment of which, prior to said last mentioned date, the said Adams Express Company insisted as a condition of accepting packages, parcels and bundles for forwarding and transportation.

That upon the payment of said rates the said Adams Express Company, prior to July 1, 1898, was accustomed to call for packages, parcels and bundles at deponent's place of business, in the City of New York, receive the same, issue its own receipt therefor, and deliver the same at destination, whether in this or other States, to the consignee and take from the consignee, to itself, a receipt for the delivery thereof.

That on or about the first day of July, 1898, the said Adams Express Company issued a circular of instructions to its agents and employees, in the City of New York and throughout the country, in which the attention of such agents and employees was called to the Revenue law referred to in the complaint herein; and said agents and employees were instructed by such circular to see that each receipt, upon which a stamp is required, has the proper stamp affixed thereto and properly canceled; and they were further instructed that in every case the amount of the stamp must be collected from the parties to whom the receipt is issued, and that all rates quoted on and after July 1, 1898, must be plus the revenue tax.

That for a long time prior to the first day of July, 1898, it was and still is the custom of the plaintiff and other large retail houses in the City of New York to deliver all goods purchased from them to their respective customers if within 100 miles from the City of New York free of charge for delivery, and by reason of the rates established by the Adams

Express Company, as well as the other express com- 31
panies, having forwarding and transportation facilities in the City of New York, the said Adams Express Company was largely employed by the plaintiff and other large retail houses for the forwarding and transportation of packages, parcels and bundles to their respective customers.

That the plaintiff's business is done upon a very narrow margin of profit, and the exaction by the said Adams Express Company of the payment of said tax by the plaintiff is a serious detriment and disturbance to the plaintiff's business, and will be a serious detriment and injury to plaintiff's business during the pendency of this action, and the refusals of the said Adams Express Company set 32
forth in the complaint, and the continuance of the acts therein complained of during the pendency of the action, would produce great injury to the plaintiff and will be a great detriment and disturbance to its business, and will greatly interfere therewith, and that said injury will be continuous and the plaintiff will daily be required to either submit to the payment of the Internal Revenue Tax upon each receipt issued for forwarding and transportation by express, or to forward his packages, parcels and bundles by some other means, to his great and irreparable injury.

WILLIAM CRAWFORD.

Sworn to before me this 17th } 33
day of August, 1898. }

JOHN J. RANAGAN,
Commissioner of Deeds,
Borough of Manhattan,
City of New York.

34

SUPREME COURT

OF THE STATE OF NEW YORK.

WILLIAM CRAWFORD,
Plaintiff,

AGAINST

WILLIAM L. HUBBELL, as Treasurer of the ADAMS EXPRESS COMPANY,
35
Defendant.

The plaintiff desires the trial of this action in the County of New York.

Summons.

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

36 Dated New York, August 17, 1898.

DILL, SEYMOUR & KELLOGG,
Plaintiff's Attorneys.
Office and Post Office address,
27 Pine Street,
New York City,
N. Y.

SUPREME COURT, 37

COUNTY OF NEW YORK.

WILLIAM CRAWFORD,
Plaintiff,

AGAINST

WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company,
Defendant.

Complaint. 38

The above named plaintiff, by Dill, Seymour & Kellogg, its attorneys, complaining of the defendant, respectfully shows to the Court:

I.—That at all the times hereinafter mentioned the above named plaintiff was and is a retail merchant in the City of New York, carrying on said business as the sole surviving partner of the firm of Simpson, Crawford & Simpson, and under said firm name, and plaintiff has duly complied with all the requirements of law to entitle him to do business under said firm name. 39

II.—That the said Adams Express Company at all the said times was and is an unincorporated association or joint stock company, consisting of seven or more persons, carrying on business in the City and State of New York, and elsewhere in the United States, and that the said association has and has had a president and treasurer; that the above named defendant, William L. Hubbell, is the treasurer of the said Adams Express Company.

III.—That the said Adams Express Company is now and has been for many years last past engaged in the business of transporting and forwarding express packages between points located within the State of New York and between points located within the State of New York and those located within other States of the United States and between points located within such other States, as a common carrier, and that during the said time it has continuously held itself out to the public as an inter-State and intra-State common carrier of express packages in the manner aforesaid.

IV.—That in the course of its business as such common carrier, it has entered into contracts with various railroad companies having terminals in the City of New York and elsewhere, whereby it has acquired the right to transport and forward such express packages over the lines of such railroads.

V.—That the said Adams Express Company, among its other contracts, has entered into an arrangement or contract with the New York, New Haven and Hartford Railroad Company, whereby it has acquired exclusive right to forward and transport express packages over the lines of the said railroad between New York and Danbury, Connecticut, and that the said Adams Express Company is the only company or concern engaged in the business of forwarding and transporting express packages between New York and Danbury, either over the lines of the said New York, New Haven and Hartford Railroad or over any other lines of railroad.

VI.—That the business conducted by the said Adams Express Company at the times herein mentioned was and is of a public nature, involving the use of public highways, streets and franchises, and that the said Adams Express Company was and is a common carrier, and subject to all legal responsibilities as such.

VII.—That heretofore and prior to the first day of July, 1898, the said Adams Express Company had established fixed and regular rates and charges for the forwarding and transportation of goods and chattels between New York and Danbury, and that the rate thus established and charged for packages of twenty pounds or under in weight and of a value less than $50, between New York and Danbury aforesaid, was thirty-five cents per package. That the said Adams Express Company prior to the said time had advertised and held itself out as willing and ready to forward and transport express packages of the said weight and value from New York to Danbury upon payment in advance to it by the shipper of the sum of thirty-five cents.

VIII.—That at all the times mentioned herein, and for many years last past, the above named plaintiff was and is carrying on the said business of retail merchant in the City of New York and elsewhere, with his principal office and place of business in the City, County and State of New York.

That from the nature of and in the course of his business, he is and has been, during said period, compelled to ship large quantities of goods to various parts of the United States by express, and that it has been and is of great importance to this plaintiff that such shipments should go by express and not by freight or otherwise, and that they should be promptly delivered at their places of destination under safeguard against loss such as express companies employ, and should be forwarded or transported at reasonable prices and charges. That the competition between plaintiff and his rivals in business is such that in the event of any inability to forward goods by express, as aforesaid, he would be subjected to great detriment and disadvantage and most seriously injured in his business.

That among the places to which plaintiff is frequently compelled to thus ship goods by express is Danbury, Connecticut, above mentioned, and that

46 the only express company forwarding or transporting goods between New York and said Danbury is the said Adams Express Company.

That the said plaintiff has also made very large express shipments for many years last past over the lines of the Adams Express Company to other places upon the said lines, and has likewise shipped very largely over the lines of other express companies carrying goods from New York to other localities That the average number of express shipments heretofore made by the plaintiff over all of the said express lines from the City of New York has not been less than 2,500 per month, and for the month of June, 1898, was twenty-nine hun-
47 dred and seventy-six, and that the average number of shipments heretofore made by the plaintiff over the lines of the Adams Express Company has not been less than seven hundred shipments per month, and for the month of June, 1898, was seven hundred and sixty-nine. That the plaintiff's business has been and is growing and extending, and that the aggregate number of shipments which the plaintiff will hereafter be required to make in the regular and ordinary course of its business over the lines of the said Adams Express Company and of the other express companies having terminals in New York, will not be less than the amount of shipments in the past.

48

IX. —That on the 15th day of August, 1898, the above named plaintiff, in the regular course of his business, offered and tendered to the said Adams Express Company at its office in the City of New York, a parcel of merchandise and requested the shipment, forwarding and transportation thereof to said Danbury, Connecticut, which is located on the line of the said New York, New Haven and Hartford Railroad. That the said parcel was of the kind and nature which the said Adams Express Company has heretofore held itself out and is now holding itself out as being willing and ready to transport by express

as a common carrier, was properly prepared for 49
transportation, and the same was in weight less than twenty pounds, and in value was less than $50. That the said package was duly labeled and addressed to Messrs. Quinn & Scott, at said Danbury. That the said Quinn & Scott are and for a long time past have been regular customers of the plaintiff and doing business with and making purchases from the plaintiff, and that the contents of said package was so tendered for transportation as aforesaid, pursuant to a *bona fide* order therefor received by the plaintiff from the said Quinn & Scott. That said parcel or package was in all respects as to size, contents, wrapper, address and all other particulars, in strict conformity with the rules, regulations and require- 50
ments of the said Adams Express Company. That the plaintiff at the time of said tender of the said parcel, likewise tendered in legal tender money of the United States to the said Adams Express Company, the sum of thirty-five cents for the transportation thereof, and that the sum thus tendered was the amount of the charge or rate as established by the said Adams Express Company for such transportation prior to July 1, 1898.

X.—That the said Adams Express Company refused to accept said package for shipment or transportation unless the plaintiff should pay in advance to the Adams Express Company the 51
price or value of the stamp required by the Act of Congress approved June 13, 1898, and entitled "An Act to Provide Ways and Means to Meet War Expenditures, and for other Purposes," or furnish such stamp to be attached and canceled to the bill of lading, manifest, or other evidence of receipt or forwarding required by said act, to be issued by all express companies and common carriers to shippers or consignors.

Said Adams Express Company has stated to the plaintiff that it has raised and increased its rates as the same existed prior to July 1, 1898, for the for-

52 warding or transportation of such packages by adding thereto the amount or value of the said internal revenue stamp required by law to be placed upon such bill of lading or receipt, for the purpose of reimbursing itself for the amount of such tax imposed by said act.

That upon the tender of the package for forwarding and transportation as aforesaid said Adams Express Company then and there refused to accept said package for forwarding or transportation unless the plaintiff should himself before the issue by the said Adams Express Company of any bill of lading or receipt therefor, attach to said bill of lading or receipt the stamp required by said act, or should
53 pay in advance to the Adams Express Company the price or value of the stamp to be affixed thereto by said company.

XI.—That the said Adams Express Company has further stated to plaintiff that it would accept no parcels, packages, bundles, boxes or bales for transportation by express to said Danbury or to any other point upon its lines, unless the shipper or consignor paid to it the price or value of the said stamp required to be attached and canceled to the said bill of lading or furnished the same, in addition to the amount of its rates as established prior to July 1, 1898, and has
54 stated that it had raised or increased its rates for forwarding and transportation to all points reached by its system, by adding to all such rates as established prior to July 1, 1898, the price or value of the said revenue stamp, and that in the future they would not accept for shipment, forwarding or transportation from any shipper or consignor, any bundle, bale, package or parcel or article unless such shipper or consignor paid them the price or value of the said stamp in addition to the said rate established prior to July first, 1898.

XII.—That thereupon the plaintiff refused to pay 55
the amount of the said stamp, and demanded of the said Adams Express Company that they accept the said package for transportation upon receipt of the rate tendered by the plaintiff, and inquired of the said Adams Express Company whether it had any other ground for its refusal to accept said package other than the non-payment of the said tax. That the said Adams Express Company still persisted in its refusal to accept said package for transportation, and stated that it had no other reason for its refusal than the refusal of the plaintiff to pay the amount of the said tax.

That the said plaintiff was unable to compel the said Adams Express Company to receive the said 56
package, and that the same was not accepted or received by it.

XIII.—That the said Adams Express Company as above stated is the only company or concern carrying on the business of a common carrier of express packages between New York and said Danbury, and that by reason of the foregoing refusal and action it became impossible for the plaintiff to send the said package by express to said Quinn & Scott.

XIV.—That the action taken by the Adams Express Company with regard to the requiring the shipper or consignor to pay the amount of the said tax has 57
been also taken by the American Express Company, the United States Express Company, the Wells-Fargo Express Company and by all or nearly all of the express companies having terminals in the City of New York, and that all of the said express companies have refused and are refusing to accept for transportation any bundles, bales, packages, parcels or things, except upon the condition that the shipper or consignor furnish and pay to such express companies the amount or value of the said war revenue stamp, in addition to the rates or charges for

transportation as established by such express companies prior to July 1, 1898.

That by reason of said action on the part of all the said express companies, all or nearly all of the shippers of express packages in the City of New York, and a very large number in other parts of the United States, are prevented from shipping goods by express, except upon the payment of the tax aforesaid.

XV.—Upon information and belief, that the said action on the part of the said Adams Express Company and the other express companies, in compelling the plaintiff and other shippers to pay the amount of the said tax, is unreasonable and unlawful and in violation of the statutes of the United States in such cases made and provided.

XVI.—That by reason of the very large number of packages which plaintiff is required, in the ordinary course of its business to ship by express the plaintiff will be subjected, unless relief is afforded by this Court, to the necessity of bringing a very large number of suits for the recovery from time to time of such moneys as he may pay under protest, pursuant to the imposition of the said tax, and that the said necessity will result in a multiplicity of suits which would be disastrous in the highest degree to the plaintiff's rights, and would cause an excessive and inordinate expense, and would interfere most seriously with plaintiff's business and occupation, for all of which no adequate remedy would exist at law.

That by reason of the action of the Adams Express Company, as above stated, the said plaintiff will be hindered and delayed in the transportation of its goods by express, and its business and occupation will be otherwise interfered with, largely to its damage, and that the exact amount of such damage is wholly incapable of accurate compensation,

and that the plaintiff will have no adequate remedy 61
therefor at law.

XVII.—That in the determination of the said question, not only the rights of the plaintiff, but of all other shippers of express packages in the City and State of New York and throughout the entire United States of America are likewise involved, and that the interests of the said shippers with regard to the foregoing are identical with those of the plaintiff, and that to enforce said interests, unless relief be granted and the matter disposed of by injunction, a great multiplicity of suits will be required, to the excessive damage of such shippers and consignors, and for which no adequate remedy will otherwise 62
exist.

WHEREFORE, the plaintiff demands judgment against the defendant and against the Adams Express Company, its agents, employees and servants, that they and each of them be enjoined, restrained and prohibited from refusing to accept and receive for forwarding and transportation the said package tendered for forwarding and transportation, as set forth in the complaint upon the prepayment or offer to prepay the regular aad established charges of such forwarding and transportation, to wit, the sum of thirty-five cents.

That they and each of them be enjoined, restrained 63
and prohibited from refusing to accept and receive for forwarding and transportation and from refusing to forward and transport any other package or packages of the kind and character which the said Adams Express Company is accustomed to forward and transport, and of the kind and charafter of which the said Adams Express Company holds itself out to the public as a common carrier, when the offer or tender of such package shall be accompanied by the prepayment or offer to prepay the regular and established charges of the said Adams Express Company for such forwarding and

64 transportation, exclusive of the United States revenue stamp required by said Act of Congress approved June 13, 1898, to be affixed to the bill of lading, manifest or other evidence of receipt and forwarding, and exclusive of the price, cost or value of such stamp.

That they and each of them be enjoined, restrained and prohibited from requiring of the plaintiff as a condition of forwarding and transporting a package or packages for the plaintiff that the plaintiff directly or indirectly furnish or pay for the United States revenue stamp required by said act to be affixed to the bill of lading, manifest or other evidence of receipt and forwarding.

65 That they and each of them be enjoined, restrained and prohibited from requiring of the plaintiff or any of its consignees as a condition of the forwarding and transportation and delivery of any package that the plaintiff or such consignee directly or indirectly furnish or pay for the United States revenue stamp required by such act to be affixed to the bill of lading, manifest or other evidence of receipt and forwarding.

That they and each of them be enjoined and required to accept and receive for forwarding and transportation and to forward and transport for the plaintiff any package or packages of the kind and character they are accustomed to forward and

66 transport and of the kind and character of which they hold themselves out to the public as custom carriers, at the regular rates established by them prior to the first day of July, 1898, and without requiring from the plaintiff that he furnish or pay for the United States revenue stamp required by said act to be affixed to the bill of lading, manifest or other evidence of receipt and forwarding.

That they and each of them be enjoined, restrained and prohibited from requiring of the plaintiff as a condition of the plaintiff's employing the Adams Express Company as a common carrier that the plaintiff or its consignees, directly or indirectly, furnish or

pay for the United States revenue stamp or stamps 67
required by said act to be affixed to the bill of ladings, manifest or other evidence of receipt and forwarding, either as a separate and distinct charge for forwarding and transportation or by way of an increased rate for such forwarding and transportation.

That pending the determination of this action a temporary order and injunction to the effect aforesaid be issued.

That plaintiff have such further other order or relief as may be equitable and just.

That the plaintiff recover from the defendant the costs and disbursements of this action.

DILL, SEYMOUR & KELLOGG,
Plaintiff's Attorneys, 68
27 Pine Street,
New York City.

BOROUGH OF MANHATTAN,
City and County of New York, } ss.:

WILLIAM CRAWFORD, being duly sworn, says.: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WILLIAM CRAWFORD.

Sworn to before me this 17th } 69
day of August, 1898. }

JOHN J. RANAGAN,
Commissioner of Deeds,
Borough of Manhattan,
City of New York.

(Endorsed)—Supreme Court, New York County.—William Crawford, Plaintiff, against William L. Hubbell, Treasurer of the Adams Express Company, Defendant.—Notice of Motion for Injunction, Affidavit, Summons and Complaint.—Dill, Seymour & Kellogg, Attorneys for Plaintiff, 27 Pine Street, New York.

70 **Bond on removal.**

KNOW ALL MEN BY THESE PRESENTS:

That we, WILLIAM L. HUBBELL, of the City of Bridgeport, County of Fairfield and State of Connecticut, sued as treasurer of The Adams Express Company as principal, and THE AMERICAN SURETY COMPANY OF NEW YORK, having an office and principal place of business at No. 100 Broadway, in the City of New York, as surety, are held and firmly bound unto WILLIAM CRAWFORD in the penal sum of five hundred dollars ($500) lawful money of the United States of America, for the payment whereof
71 well and truly to be made unto said William Crawford, we bind ourselves, and our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

YET UPON THESE CONDITIONS,

The said William L. Hubbell, sued as treasurer of The Adams Express Company, having petitioned the Supreme Court of the State of New York in and for the County of New York for the removal of a certain suit therein pending wherein the said William Crawford is plaintiff and the said William L. Hubbell, as treasurer of The Adams Express Company, is defendant, into the Circuit Court of the United
72 States for the Southern District of New York,

NOW, THEREFORE, if the said William L. Hubbell, treasurer of The Adams Express Company, shall enter in the said Circuit Court of the United States for the Southern District of New York on the first day of its next session, a copy of the record in such suit, and pay all the costs that may be awarded by the said Circuit Court of the United States, if said Circuit Court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear in said Circuit Court and enter special bail in such suit, if special bail was originally required

therein, then this obligation to be void; otherwise to 73
remain in full force and virtue.

WITNESS our hands and seals this 24th day of August, A. D. 1898.

WILLIAM L. HUBELL, [SEAL.]
By SEWARD, GUTHRIE & STEELE,
Attys. in fact,

AMERICAN SURETY COMPANY OF NEW YORK,
By H. D. LYMAN,
Vice-President.
W. S. MACKELLAR,
[SEAL.] Assistant Secretary.

STATE OF NEW YORK, } ss.: 74
County of New York, }

On this 25th day of August, 1898, before me personally appeared Charles Steele, to me personally known and known to me to be a member of the firm of Seward, Guthrie & Steele, and who executed the foregoing bond on behalf of William L. Hubbell, as his attorney in fact, and he acknowledged to me that he executed the same.

JOHN J. DALY,
Notary Public,
Kings County.

Cert. filed in N. Y. Co.

State, City and County of New York, ss.: 75

On this 24th day of August, 1898, before me personally appeared H. D. Lyman, Vice-President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say, that he resided in the City of New York; that he is the Vice-President of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by

76 order of the board of directors of said corporation, and that he signed his name in the manner provided by law. And the said H. D. Lyman further said that he was acquainted with Mackellar and knew him to be the assistant secretary of said corporation; that the signature of said W. S. Mackellar subscribed to the said instrument is in the genuine handwriting of the said W. S. Mackellar, and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said H. D. Lyman, vice-president.

W. H. BISHOP,
Notary Public,
New York County.

77

At a regular quarterly meeting of the Board of Directors of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by
78 law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

City and County of New York, ss.:

I, W. S. MACKELLAR, Assistant Secretary of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and

true transcript therefrom, and of the whole of said 79
original resolution.

Given under my hand and the seal of the company, at the City of New York, this 24th day of Aug., 1898.

W. S MACKELLAR,
Assistant Secretary.

(Endorsed)—Supreme Court, City and County of New York.—William Crawford against William L. Hubbell, as Treasurer of Adams Express Company.—Bond on Removal.—Seward, Guthrie & Steele, Attorneys for Defendant, 40 Wall Street, New York.

80

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK,

WILLIAM CRAWFORD, Plaintiff, AGAINST WILLIAM L. HUBBELL, as Treasurer of Adams Express Company, Defendant.	Notice of Appearance and Demand. 81

Please take notice, that the defendant William L. Hubbell, as Treasurer of Adams Express Company, appears in this action, and that we are retained by, and appear as attorneys for, the said defendant in this action, and demand that a copy of the complaint

82 and all other papers in this action, be served on us at our office, No. 40 Wall Street, New York City.

Dated New York City, August 18, 1898.

Yours, &c.,

SEWARD, GUTHRIE & STEELE,
Attorneys for said Defendant.
Office and Post Office address,
No. 40 Wall Street,
New York City, N. Y.

To DILL, SEYMOUR & KELLOGG, Esqs.,
Attorneys for Plaintiff.

83 (Endorsed)—Supreme Court, New York County.—William Crawford, against William L. Hubbell, as Treasurer of the Adams Express Company.—Notice of Appearance and Demand.—Seward, Guthrie & Steele, Attorneys for Defendant, 40 Wall Street, New York.—Copy received, August 22, 1898, Dill, Seymour & Kellogg, Attorneys for Plaintiff, 27 Pine Street, New York.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

84

WILLIAM CRAWFORD,
Plaintiff,

AGAINST

WILLIAM L. HUBBELL, as Treasurer of The Adams Express Company,
Defendant.

Notice of Removal.

Dear Sirs,—You are hereby notified that the above entitled action has been duly removed from

the Supreme Court of the State of New York to the Circuit Court of the United States for the Southern District of New York, and that a certified transcript of the record therein has been this day filed in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York. 85

Dated New York, August 26, 1898.

Yours, &c.,

SEWARD, GUTHRIE & STEELE,
Attorneys for Defendant.

To Messrs. DILL, SEYMOUR & KELLOGG,
Attorneys for Plaintiff,
27 Pine Street,
New York City.

(Endorsed)—U. S. Circuit Court, Southern District of New York.—William Crawford against William L. Hubbell as Treasurer of Adams Express Company.—Notice of Removal.—Seward, Guthrie & Steele, Solicitors for defendant, 40 Wall Street, New York.—Copy received Aug. 29, '98. —Dill, Seymour & Kellogg. 86

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WILLIAM CRAWFORD, Plaintiff, AGAINST WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company, Defendant.	Notice of Motion to Remand.

87

Take notice, that upon the petition of William L. Hubbell, treasurer of the Adams Express Company,

88 the above named defendant, for the removal of this cause from the State to the Federal Court, dated August 25, 1898, and upon the order or removal granted thereon, and upon the summons and complaint herein and the affidavit of William Crawford, verified the 17th day of August, 1898, annexed thereto, and upon all the papers and proceedings herein, an application will be made to this Court, at the opening thereof, on the 7th day of September, 1898, in the Federal Building, in the Borough of Manhattan, City of New York, for an order remanding this case to the Supreme Court of the State of New York and directing that no further proceedings herein be had in the Circuit Court of the United
89 States, upon the ground, among others, that the said Circuit Court of the United States is without jurisdiction to hear and determine the case and the same was improperly removed thereto.

And the plaintiff will ask for such other order and relief as may be just, with costs.

Dated September 2, 1898.

DILL, SEYMOUR & KELLOGG,
Attorneys for Plaintiff,
27 Pine St.,
New York City.

To Messrs. SEWARD, GUTHRIE & STEELE,
Attorneys for Defendant,
90 40 Wall St.,
New York City.

U. S. CIRCUIT COURT, 91

SOUTHERN DISTRICT OF NEW YORK.

WILLIAM CRAWFORD

AGAINST

WILLIAM L. HUBBELL, as Treasurer of Adams Express Company.

92

Motion to Remand.

LACOMBE, *Circuit Judge:*

An analysis of the bill of complaint shows conclusively that the real controversy tendered is whether or not the terms of the recent War Revenue Act require express companies to pay for the stamps to be affixed to the receipts they give and forbid their exacting the price of such stamps from their customers, or whether such Act leaves the question "Who shall pay for the revenue stamp?" open between the parties. Manifestly, then, this is a cause "arising under (a) law providing internal revenue" 93
(Sec. 629, U. S. Rev. Stat.). It has been held in this Court that the application of the section last quoted has not been modified as to removed causes by the Acts of 1887 and 1888 (Vinal *v.* Continental Construction Co., 34 F. R., 288).

Motion denied.

(Endorsed)—Crawford *v.* Hubbell, etc.—U. S. Circuit Court.—Filed September 13, 1898.—John A. Shields, Clerk.

94 **Order denying motion to remand.**

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held at the United States Court House and Post Office Building, in the County of New York, on the 24th day of September, 1898.

Present—Hon. E. HENRY LACOMBE,
Circuit Judge.

95 WILLIAM CRAWFORD

vs.

WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company.

This cause coming on to be heard on the 7th day of September, 1898, upon the motion of the plaintiff to remand this cause to the Supreme Court of the State of New York, County of New York, and after hearing Frederick Seymour, Esq., of counsel for plaintiff, in support of said motion, and Charles
96 Steele, Esq., of counsel for the defendant, in opposition thereto, and the same having been duly considered by the Court, it is

On motion of Seward, Guthrie & Steele, solicitors for the defendant,

Ordered, that the said motion to remand this cause to the Supreme Court of the State of New York be and the same is hereby denied.

Enter.

E. HENRY LACOMBE,
United States Circuit Judge.

SUPREME COURT OF THE UNITED STATES. 97

WILLIAM CRAWFORD,
Plaintiff and Appellant,

AGAINST

WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company,
Defendant and Appellee.

Term No. 248.

98

It is hereby stipulated and agreed that the foregoing record contains in itself and not by reference, the petition on removal, notice of motion for injunction, affidavit for injunction, summons, complaint, bond on removal, notice of appearance, notice of removal, notice of motion to remand, opinion of Mr. Justice Lacombe denying motion to remand, and order denying motion to remand, being all the papers read before the Court on the argument of the motion to remand.

Dated New York, November 10, 1899.

Dill Seymour & Baldwin
99
Attorneys for Plaintiff and Appellant,
27 Pine Street,
New York City.

Seward Guthrie & Steele,
Attorneys for Defendant and Appellee.

No. 248. (by Cour

Case No. 17,465 Wells Fargo

Brf. of Alexander for

Supreme Court of the United States.

Filed Oct. 27 1899

TERM NO. 248.

OCTOBER TERM, 1899.

Supreme Court U. S.
FILED
OCT 27 1899
JAMES H. McKENNEY,
Clerk.

WILLIAM CRAWFORD,
Appellant,

against

WILLIAM L. HUBBELL, as Treasurer of The Adams Express Company,
Appellee.

Brief in Behalf of Wells, Fargo & Company.

PRESENTED BY LEAVE OF THE COURT.

CHARLES B. ALEXANDER,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Case No. 17,345.

Supreme Court of the United States.

TERM No. 248.

OCTOBER TERM, 1899.

WILLIAM CRAWFORD,
Appellant,

AGAINST

WILLIAM L. HUBBELL, as Treasurer of The Adams Express Company,
Appellee.

BRIEF PRESENTED BY LEAVE OF THE COURT IN BEHALF OF WELLS, FARGO & COMPANY.

Statement.

This is a suit brought for the purpose of enjoining the Adams Express Company, of which the appellee is treasurer, from requiring shippers dealing with it to pay for or furnish to the company the revenue stamp which the War Revenue Act of 1898 requires to be

attached to the receipts, manifests and bills of lading issued by the carrier to the shipper, on receipt of goods for carriage and transportation.

Complainant's bill was dismissed by the Circuit Court for the Southern District of New York. An appeal having been taken to the Circuit Court of Appeals for the Second Circuit, the case comes to this tribunal upon the certificate of the Judges of that Court.

Appellant sues on behalf of a large number of merchants and shippers for the purpose of obtaining a construction of that section of the act which lays this stamp tax. He seeks not only to force the express carriers to pay the whole amount of the tax in question, but also to prevent any corresponding increase in their tariff of transportation rates, by which means they might seek to cover the enormously increased cost of operation which such a tax would thrust upon them.

Appellant contends that Congress intended to tax the business of carrying goods for hire, and to lay the tax in such a way as would prevent or prohibit the carriers from shifting any portion of the tax upon the the shippers. He claims that the act declares—expressly or by necessary implication—*(a)* that the carrier must pay the tax, and *(b)*, admitting that the payment of it will diminish the margin of profit, yet that the express companies should not be allowed to increase their reasonable charges for transportation in any degree by reason thereof. This he insists on, even if, without such a revision of his rates, he cannot obtain a fair return for the capital and industry he invests in his business, or adequate compensation in proportion to the extraordinary duties and liabilities, to which he is held by statute and common law. It is contended that Congress has thus singled out this particular occupation as the object of an extraordinary and wholly unprecedented exaction. This cannot fairly be called a tax, if appellant's views are correct because, as he gravely asserts at page 32 of

his brief in the Circuit Court of Appeals, "the carrying business of the country is in the hands of gigantic corporations and associations, enjoying public franchises of the greatest value, earning annual profits of immense amounts," etc., etc., and he believes that Congress thought that they should be forced to disgorge for the benefit of the government "out of the immense wealth which they have accumulated under the nation's protection."

Wells, Fargo & Company, which presents this brief by permission of the Court, is not only interested as a common carrier and as one of the largest express companies in the country, but as one of that class (being a corporation) against which, if the assertion of appellant is to be believed, the animus of the Legislative Power has been chiefly directed. The appellee is not a corporation, but a joint stock association with the elements of a limited partnership. It may be urged that there is some difference between the position of a corporation and an unincorporated body of carriers, and if this claim is made it should be answered by the representative of a corporation.

It is desired by Wells, Fargo & Company to submit and argue in brief certain propositions upon the subject of the case in hand.

I. It is not the policy of the Government to lay greater burdens upon corporations and their stockholders than upon other individuals. A construction of the statute which will avoid this result will be adopted.

II. The intention of the act is to tax the transaction of shipment; not the business of carriage.

III. The act provides that either party may pay the tax.

IV. Even if the tax had been expressly laid upon

the carrier, he had a right to increase his charges sufficiently to cover it.

V. It is not to be presumed that Congress intended to lay an unusual and heavy and disproportionate burden upon a special occupation or class of persons, and, if the statute be ambiguous, that construction will be adopted which is most just and reasonable and which will avoid this conclusion.

Point I.

It is not the policy of the Government to lay greater burdens upon corporations and their stockholders than upon other individuals. A construction of the statute which will avoid this result will be adopted.

The attitude of appellant appears to be that the intention of Congress, in the freight and express clause of the War Revenue Act, was to inflict a penalty on common carriers, and, in particular, corporations engaged in the express business.

Wells, Fargo & Company was incorporated in 1866 by the State of Colorado. Its capital stock, of a par value of $8,000,000, is held by some 2,100 shareholders distributed from Maine to California. The average single holding of stock in the company is only thirty-eight shares. The company gives employment to about 6,400 persons. It has for some years paid an annual dividend of six per cent. on its stock.

While the above facts are not pleaded, yet, if the Court recognizes the claim of appellant that there are rich corporations, it may equally consider these facts.

It is clear that any burden placed upon this corpo-

ration is not, as appellant seems to assume, borne by a bloated and greedy artifical entity, but by some 8,500 persons in all sorts and conditions of worldly circumstance. Congress must, therefore, according to appellant, be assumed to have been desirous of afflicting these and similar persons by this legislation. Such construction of the Act will reach the employee, as well as cut down the profits of the stockholder, for certainly no employer could maintain his present standard of wages after the Government had placed upon his business a tax amounting to a very heavy annual burden, and had forbidden any shifting of it to customers and patrons.

The intention which appellant would attribute to Congress is wholly contrary to the spirit of our Government and laws and any just view of public policy.

Any and every presumption, under forced construction, against corporations as such, works violence mediately to the property interests of individuals. That this is fact must be self-evident, and is so stated by Judge FIELD in the case of San Mateo County vs. Southern Pacific Railway Co., 13 Fed. Rep., 722:

"To deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value. Their interest, undivided though it be, and constituting only a right during the continuance of the corporation to participate in its dividends, and on its dissolution to receive a proportionate share of its assets, has an appreciable value, and is property in a commercial sense, and whatever affects the property of the corporation necessarily affects the commercial value of their interests."

And in the same case, and to the same effect, run the remarks of Judge SAWYER:

"The property of the corporation is in reality the property of its individual corporators. A state statute depriving a corporation of its property does deprive

the individual corporators of their property. These clauses of the Fifth and Fourteenth Amendments, and the similar clauses of the State Constitution, apply, therefore, to private corporations, not alone because such corporations are 'persons,' within the meaning of that word, but also because statutes violating their provisions, in dealing with corporations, must necessarily infringe upon the rights of natural persons. In applying and enforcing these constitutional guaranties, corporations cannot be separated from the natural persons who compose them."

Corporations are not the object of reprobation by the people of the United States. They have been created by the people themselves. Their chartered rights are given them by Congress or by the States.

If there be indulged the presumption that, whenever an act is passed in anywise touching corporate industries and enterprises, such act was, in fact, intended as penalty, it will disturb the normal adjustments of our social fabric, and derange the complicated machinery of the industries upon which each one of us daily and hourly depends. Indulgence in such presumption not only denies justice and equality under the law, but is against public policy, because inimical to business prosperity, tending to suppression by means of oppression. But, in the words of an eminent publicist and economist, recently quoted by a distinguished Senator of our Government, "Are all corporations to be suppressed? If so, the proposition is very simple. Of course, this can be done if the people want it, but it would stop every railroad, trolley, cable and horse-car system in the country and close 90 per cent. of the manufacturing and business concerns. In fact, nearly all businesses larger than the peanut stand would have to be dissolved and redistributed into small efforts, about the equivalent of what existed in the walled towns in the thirteenth century. It would, in fact, wipe out about all the economic effectiveness the last five centuries of industrial evolution have produced.

A war on corporations without some definite economic basis of discrimination, then, is simply a war on business success."

We submit, however, that, under principles of right, justice and policy, such untoward presumption may not obtain. Corporations, equally with natural persons, are within the protection and pale of the law, and a statute will not be given construction which will discriminate against them.

Crafford vs. Board of Supervisors, 87 Va., 110.
People vs. Barker, 140 N. Y., 437.

And the Fourteenth Amendment to the Constitution of the United States (Section 1), providing that "no state shall * * * deny to any person within its jurisdiction the equal protection of the laws," has been repeatedly held to include corporations as persons within its meaning.

Santa Clara County vs. So. Pacific Co., 118 U. S., 394.
Pembina Co. vs. Pennsylvania, 125 U. S., 181.
Missouri Co. vs. Mackey, 127 U. S., 205.
Home Ins. Co. vs. New York, 134 U. S., 594, 605.
Charlotte Railroad Co. vs. Gibbes, 142 U. S., 386, 391.
Gulf Co. vs. Ellis, 165 U. S., 150, 154.
Smyth vs. Ames, 169 U. S., 466.

And, in commenting on the provisions contained in the Fifth Amendment to the Constitution of the United States, Judge FIELD, in the case of San Mateo County vs. Southern Pacific Railway Co., 13 Fed. Rep., 722, says: "From the nature of the prohibitions in this amendment it would seem, with the exception of the last one, as though they could apply only to natural persons. * * * But such has not been the construction of the courts. A similar provision is found in nearly all of the state constitutions; and

everywhere, and at all times, and in all courts, it has been held, either by tacit assent or express adjudication, to extend, so far as their property is concerned, to corporations. And this has been because the property of a corporation is in fact the property of the corporators."

Upon the discovery of steam and machinery, aggregations of persons and capital became a necessity, and, after much opposition, a fact. To-day the people of the various States recognize the benefits of such aggregations, as appears by amendments to the majority of our State Constitutions granting privileges and benefits of corporate organization equally to all, such legislation being undoubtedly declarative of public policy.

Congress must have had in mind that the day has gone by when the needs of the people can be supplied by individuals acting independently and without the union of their financial means and of their labors. That the time when freight or passengers could be dragged by small individual carriers over the common highway for short distances at varying cost has forever passed. That the magnitude of the trade and travel of the American people has for sixty years required industrial enterprises which no single fortune could or would undertake, and from these necessities have grown, not by force of law, not by persuasion or fraud, but from the exigencies of the situation, these aggregations or unions of assets or means, by which all great enterprises are at present conducted.

It is hardly fair to assume that in this indirect and peculiar way Congress has sought to clip their wings.

Appellant seeks to justify the effort to mulct the express companies, by the statement that the profits of these companies have been obtained "by the exercise of quasi public franchises and privileges" and the enjoyment of "public franchises of the greatest value." He says, at page 31 of his brief in the Circuit Court of Appeals: "The business here involved is a quasi

public business conducted by corporations and other organizations which are quasi corporate in their character, operating under privileges and franchises from the sovereign."

Express companies are not, like railways, quasi public corporations, nor are they given the power of eminent domain, nor erected into monopolies, nor granted any other exclusive or remarkable privileges, nor do they exercise any franchise by reason of their occupation, nor indeed any franchises, except, in case they are incorporated, such as are conferred by the sovereign upon all business corporations. The franchise of Wells, Fargo & Company, for example, was conferred upon it by the State of Colorado, by an act of which it was incorporated, and by whose sovereignty it is visited and taxed. Neither that charter nor any of the other express company charters give any wonderful or special grant of powers.

The carrier's employment, it is true, is in a sense a public one, as is that of an innkeeper, in that he cannot refuse his service to any and is bound to carry for all at a reasonable rate. But it appears that, far from enjoying franchises and privileges, express companies have extraordinary burdens, duties and liabilities placed upon them by the State. They are held to a very high degree of care; they are liable as insurers; the amount of their charges is limited by the law. But if it is because these are the incidents of the carrier's occupation that appellant claims Congress meant to lay a tax upon his business, it is apparent appellant is asserting he should be taxed because he bears burdens and not because he exercises privileges.

The statute is not to be read in the lurid light which appellant seeks to cast upon it, but by the ordinary and clear meaning of its provisions and with the aid of the usual and familiar rules of construction. It is not the resolution of a socialistic club, but the deliberate act of the Legislature of the country, enacted in a time of great public necessity for the purpose of furnishing

as large a revenue as possible for the needs of government.

If a common carrier, performing *quasi* public duties, serving the public with great fidelity and to the great convenience of the people, and tied down by law to reasonable charges and prompt performance, as well as insurance of the safety of property entrusted to it, finds itself subjected (and its officials and employees as well) to a new set of duties, under severe penalties for omissions, neglect, evasion or violation, is it not justified in asserting that it shall be subject to no other duties or services than those *expressly* cast upon it?

POINT II.

The tax is laid upon the transaction of shipment, not upon the business of carriage.

The tax is a stamp tax, and the clause providing for it is found in the midst of a schedule of similar clauses, which unquestionably lay taxes upon transactions and not upon occupations. The act makes it the duty, of the carrier, under heavy penalty, to issue a written evidence of receipt and forwarding for each shipment. "And there shall be duly attached and canceled, as is in this Act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent." This is plainly a tax upon the transaction of shipment. It hits every such transaction. First designating an instrument to evidence the transaction—for as such the bill of lading has been regarded by this Court, viz., "an instrument of twofold character * * * at once a receipt and a contract, * * *

an acknowledgment of the receipt of property," and "a contract to carry safely and deliver" (Pollard vs. Vinton, 105 U. S., 7)—the act then destroys its evidentiary value unless stamped. It is hard to conceive of any other method so apt, simple and sure, by means of which the transaction itself could be reached. The obvious purpose of this section, so like the provisions for stamping certificates, deeds and negotiable paper, is to raise revenue by tax upon one of the most ordinary and everyday transactions of commerce.

On the other hand, were the tax designed to reach the business of the carrier, it is unequally and clumsily laid, and is to be collected in a manner involving great expense of unnecessary time and labor. The obvious and simple way to have laid such a tax would have been upon the profits or capital stock or extent of route of the carrier; or to tax the gross receipts of the business of carriage, as Congress did in the Act of 1863; or even as in Schedule A of this Act provided in case of telephone messages. The printing, selling, attaching and canceling of stamps and the necessity of stamping to entitle the paper to be used in evidence, would have been avoided as unnecessary and cumbersome. And it would certainly have been provided in precise terms in the act, that the party whose business was to be assessed was the party to pay the tax. Our legislators do not hesitate when they mean a thing to say it, especially when it relates to the payment of a tax.

No peculiar or unusual rules are to be employed for the construction of the act. The meaning of the words is plain and the character of the other stamp taxes, provided for in the same schedule of the statute, throws added light upon the clause, if any were needed.

"It is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest and leads to nothing absurd, there can be no reason to refuse the sense which naturally presents. To go elsewhere in

search of conjectures in order to restrain or extinguish it, is to endeavor to elude it."

Vattel, B. 2, c. 17, s. 263. Quoted with approval by Chancellor KENT in Jackson vs. Lewis, 17 Johns., 475, 477.

Further than this, the construction contended for by appellant involves unnecessary inconvenience.

MARSHALL, C. J., in U. S. vs. Fisher, 2 Cranch, 358, 386.
Coke, Litt., 66a, 97a.
Austin vs. Bunyard, 6 B. & S., 687; 118 E. C. L., 685.

POINT III.

The act provides that either party may pay the tax.

Harmonizing with the conclusion that the transaction of shipment, and not the business of carriage, was intended as the source of revenue, we submit that the language of the Act, in Schedule A contained, neither expressly nor impliedly designates the party whose duty it shall be to pay the tax in question, but leaves its adjustment to the parties themselves.

The one and only duty therein expressly imposed upon the carrier is, "to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation," and any failure to issue such evidences of receipt and forwarding subjects the carrier to a penalty of fifty dollars for each offense. The manifest intention of Congress, in not relying upon customary issuance of evidences of receipt

and transportation, but making them a *sine qua non* to the transaction of shipment, was, primarily, to provide a tangible foundation for revenue purposes. This accomplished, a second duty was then imposed, in language absolutely impersonal, viz., "*there shall be* duly attached and canceled, as is in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent." (Italics are our own.) Had it been the intention of Congress to impose this second duty upon the carrier, it would have employed language as clearly and unmistakably personal as in its expression and declaration of the first duty, or, at least, continuity of sentence structure. Again, it is to be noted that, for any failure to issue evidences of receipt and forwarding upon goods accepted for transportation, the carrier alone must suffer the penalty; for failure, however, to stamp such evidences when issued, the act imposes, in addition to the penalty by way of fine, a *quasi* penalty in the destruction of any and all evidentiary value of such unstamped bills of lading, decidedly more detrimental to the shipper than to the carrier, because, as was said by this Court in Friedlander vs. Texas and Pacific Railway Company, 130 U. S., 416, "they are symbols of ownership of the goods they cover," and "of the right to receive such property at the place of delivery."

Further, and in support of our contention that the act does not indicate, directly or indirectly, the one or the other party to the transaction as primarily liable to the payment of this tax, we point to Section 6 of the act, wherein the duty of payment is unmistakably imposed in the alternative:

"That, on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this Act, or

for, or in respect of, the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party *who shall make, sign, or issue* the same, or *for whose use or benefit* the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule." (Italics are our own.)

The language of the act is, we submit, as clear and definite as it could conceivably be made. The tax is to be paid by the party who makes, signs or issues the instrument, or for whose use or benefit it is made, signed or issued. Yet, appellant attempts to avoid this plainly expressed intention of the Legislature by the assertion that, although the language of Section 6 expressly applies to the documents and papers mentioned in Schedule A of the act, and although it is true the provision for the stamp tax in question is a portion of that schedule, yet it was not contained in Schedule A of the Revenue Act of 1862, but was embodied in another portion of that statute. The proposition that this express direction of Congress upon the subject in the present act should, therefore, be absolutely disregarded by the judicial branch of the Government, is certainly a novel one to be advanced in this Court. The act which lays the present tax is not the Act of 1862, but the Act of 1898. And if Congress took this provision from that position which it occupied in the former statute, and placed it in a new context in the latter, and if Congress altogether altered the phraseology of the section, and in that alteration substituted, for a clear provision that the express company should affix the stamp, an impersonal clause which merely declared that a stamp should be affixed to all bills of lading, we submit that it is to be presumed that there was some purpose in the mind of the Legislature, and that the change was not made vainly or without a definite object.

We regard the language, used by Lord Chief Justice COCKBURN in Reg. vs. Price, L. R., 6 Q. B., 411, at page 416, in construing an Act of Parliament, in point:

"When the Legislature, in legislating *in pari materia* and substituting certain provisions in that act for those which existed in the earlier statute, has entirely changed the language of the enactment, it must be taken to have done so with some intention and motive."

"It is a fundamental rule of construction that, if possible, force must be given to all the words used in a statute, and also, that when a previous statute is amended by an alteration of the terms used therein, it is to be presumed that it was the intent to alter the meaning of the previous act in that particular. * * * The natural presumption is that the phraseology of the statute was changed in order to change its meaning. The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act."

U. S. vs. Bashaw, 4 U. S. Apps., 360, 367; 1 C. C. A., 653.
Ricket vs. Met. R. Co., L. R., 2 H. L., 175, 207.
Reg. vs. Bullock, L. R., 1 C. C., 115.
Lawrence vs. King, L. R., 3 Q. B., 345, 348.
Reg. vs. Price, L. R., 6 Q. B., 411, 416.
Dickenson vs. Fletcher, L. R., 9 C. P., 1, 8.

Further supporting our contention is that portion of Schedule A, immediately following the impersonal clause requiring the attachment of a stamp:

"*Provided*, That but one bill of lading shall be required on bundles or packages of newspapers when enclosed in one general bundle at the time of shipment."

This clause was inserted in favor of newspaper publishers, and at their urgent solicitation, Congress evidently concluding that, in the process of adjust-

ment, the shipper would ultimately be the party to pay the tax.

And, finally, such construction has been placed upon the act by the Government itself, in an opinion dated August 16th, 1898, by its representative, an eminent jurist, Mr. Attorney General Griggs, rendered to Mr. John J. McCook, one of the counsel for this company:

"Replying to your letter of the 13th inst., I have the honor to advise you that the attitude taken by the Department of Justice with reference to the question as to which party, the shipper or the express company, under the War Revenue Bill, is required to furnish and pay for the revenue stamp which is required to be placed upon the manifest or bill of lading, is that this is a matter entirely between the shipper and the company. This office holds that, so far as the Government is concerned, it is only interested to know that the lawful tax is paid."

POINT IV.

Even if it were expressly provided that the tax was to be paid by the carrier, as appellant claims, the carrier may still increase his charges for transportation to cover the increased cost of operation which the tax has placed on him.

That this not only may but will be done is clearly demonstrated by this Court in the case of Almy vs. California, 24 Howard, 169. A State had there imposed a stamp tax upon certain bills of lading, and a ship master had been arrested under the act, a bill of lading issued by him not having been stamped. Chief-

Justice TANEY shows that "a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing." And in Brown vs. Maryland, 12 Wheat., 419, Chief-Justice MARSHALL points out that a license tax imposed by a State upon the occupation of an importer is, in effect, a duty upon the thing imported, as it will certainly be added to the price of the article, and be paid by the consumer. And both these cases were decided expressly upon the ground that the tax, though in the one case laid upon the transaction and in the other upon the importer's occupation, would actually operate as a tax upon the goods and be paid by the consumer.

We do not at all mean to assert that the tax now under discussion is a direct tax. It would seem certainly to be a duty or excise tax laid upon the transaction of shipment. But we urge that it is of the essence of these taxes that they may be, and are shifted in the course of trade from one shoulder to another, and that this Court has recognized the fact.

The present Chief-Justice said, in Pollock vs. Trust Co., 157 U. S., 429, 558 ; 15 Sup. Ct. Rep., 673, 680 :

"Ordinarily, all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes."

This is true of all taxes. Even direct taxes are very often shifted by the first payer to other shoulders, and this is even true of taxes upon land. The shopkeeper, for instance, in fixing the price at which he will sell his goods, must consider every element which enters into the cost of operating his business. In addition to the initial price of the goods, the salaries of salesmen, lighting, fuel and interest, the amount of his real and personal property tax must be shifted to the customer if he is to obtain a fair profit for the support of himself and his family.

It must be presumed that the Legislature was familiar with these very simple and primary principles

of taxation, and had some acquaintance in particular with the nature of the excise taxes and stamp duties it was laying.

With these considerations in mind appellant's contention falls to the ground (Point II. of his brief below) that "the imposition of this tax upon transportation carries with it an implied prohibition against the compulsory shifting of the burden by the carrier." For it appears that such a shifting is the prime and distinguishing feature of these taxes. It seems, therefore, to be a contradiction in terms to assert that an Act of Congress, by laying a stamp duty, *impliedly* prohibits the distinguishing characteristic of those duties.

What appellant means by a "compulsory shifting" appears in subdivision A, under this head of his brief below. He there asserts that the shifting of the tax would be brought about here by duress and against the will of the shipper, and that, admitting it may be shifted by assent of both parties, yet it is illegal here because the shipper pays the increased charge against his will.

It is difficult to follow the current of appellant's argument. The shipper, no doubt, would pay the carrier nothing if he had his will, and, if the definition of duress here outlined by appellant be correct, it is difficult to conceive of any commercial contract free from it. If the shipper is unwilling to pay a reasonable compensation to the carrier he is under no obligation to contract with him. But if he does contract with him he must pay the carrier his lawful rate. And if it be held that the carrier must pay the tax and his rate was reasonable before, it will certainly still be reasonable if it remains the same plus the amount of the tax levied on the transaction. And it is not duress if the carrier refuse to carry for the shipper, unless his lawful charge be paid.

Nor can the case be distinguished because the carrier exercises a public employment or because, on

that account, statute or common law requires him to charge a reasonable rate. The question of reasonable rate is one of fact to be determined by the cost of operation, and into this cost of operation the item of taxation necessarily enters. To assert, as appellant does in his brief, that the tax in question is a tax upon the profits of the express companies, and that, therefore, it should not be allowed to enter as an element into the cost of operation is, even granting his premise, a complete *non sequitur*. It is to assert that even if the tax upon the profits exceeded the amount of the profits themselves, as it might very certainly do in many instances, if the tax is to be forced upon the express company in the manner proposed, yet the company would have no right to treat that tax as an element entering into the cost of operation.

Suppose a railway company, where rates are not fixed by State law, pays a fixed percentage upon its gross receipts as a tax to the State, and that the payment of that percentage is just sufficient to wipe out its margin of profit, is it to be asserted that in the absence of any statutory regulation it would be a violation of the law for the railway to so far increase its transportation rates as to enable it to receive a reasonable reward for services rendered? It is well nigh impossible to lay any tax as a burden upon any individual or class of individuals in such a manner that the weight of part of it at least cannot be shifted to other shoulders, and it is no more an imposition upon the shipper for the carrier to raise his reasonable charges, if any new tax is laid upon him, than it is an imposition upon the customer that he has to bear a proportion of the shopkeeper's real and personal assessment when he deals at the shop.

The tax in the present instance, if it lies upon the shipper instead of upon the carrier, is divided up among so very many individuals, that it will fall with inconsiderable weight upon any. And this result is, of

course, the prime excellence of stamp taxes. As a matter of fact, if it did not fall upon him so lightly, the shipper would himself pass it along to a third party, to his consignee or buyer, for instance, and so it would be shifted from one person to another until it came to fall at last where it could most easily rest.

The appellant makes two further contentions which deserve consideration. They are:

(a) That the burden of proof rests upon the carrier to show that his rate is a reasonable one.

(b) That "the carrier has attempted directly and by compulsion to shift the burden upon the shipper as a tax, and not merely to make a reasonable revision of its rates."

In support of his first contention appellant cites as authority a number of cases in which rates have been fixed by the Legislature and the carrier is proceeding to secure a change in them. The Legislature has of course the right to fix reasonable rates for carriers, and, if the carrier complains of them, the burden is of course upon him to show that the statutory rate is not a reasonable one. These cases clearly have no application to the suit in hand.

The Interstate Commerce Act cases cited were investigations by the commission into railway rates. The statute makes it the duty of the commission to "investigate any complaint forwarded by the Railroad Commissioner or Railroad Commission of any State." An advance of rates was complained of and the commission making the statutory investigation said that "carriers making an advance in rates should be able to present a satisfactory justification of such advance." The Interstate Commerce Act has no application to express companies. The case last cited (Wells vs. Oregon Ry., 15 Fed. Rep., 561) contains nothing upon the question of burden of proof. But it does declare

the rule that a presumption exists that rates which have long prevailed are reasonable.

That presumption, we assert, prevails in this case. If, then, the rates which have for some years been settled are reasonable—bearing in mind that a reasonable rate is such a one as will allow the carrier a fair margin of profit over and above the cost of operation—and a tax of one cent be placed upon each shipment, which, if it be held the tax is to be paid by the carrier, constitutes a new item in the express company's cost of operation; it is surely reasonable that rates should be raised to compensate the carrier for such increased cost of doing business.

But appellant asserts, secondly, that the express companies are not making a new rate to cover the new cost of operation, but are in a bold and open manner making a horizontal increase in their charges of one cent upon each shipment, and thus throwing the tax, as a tax, upon the shipper. But it appears:

1. That the amount added to the charge for each shipment is the exact amount of the stamp tax on that shipment, and, hence, the exact additional cost of carrying the package shipped. This increase we contend it is fair and reasonable that each shipment should bear.

2. If the rate is to be increased it must, in each case, be increased by the amount of at least one cent, that being the smallest fractional coin we have. The shipper should not be heard to complain, if the increased charge on his own shipment is as small as it can be made, that larger shipments are not charged with a greater increase than this, nor does it appear that any such graduated scale of increase would be just.

3. Appellant also objects that the added charge "is not made a part of the rate, but is an additional and

distinct item." It appears from paragraph XII. of the agreed statement of facts on which appellant's bill was dismissed in the Circuit Court, that the express company is under contract with the railways carrying for it to pay over to them from 40 per cent. to 50 per cent. of its charges for transportation, and that, therefore, if the increase had taken the form of a technical raise in rates, instead of the addition of a separate item, the increased charge to the shipper must have been at least twice what it is. In view of these circumstances it seems unreasonable for appellant to raise this objection, and the rate, made up of two items as it is, is certainly fairer and more reasonable than such a technical increase.

We submit, therefore, that the advance in rates is a *bona fide*, fair, just and reasonable one, and one which the companies were at liberty to demand.

We have deemed it proper to discuss the questions of burden of proof and reasonableness of compensation, but, of course, these questions will not arise unless the Court shall hold that the duty of payment is directly imposed by the Act upon the carrier. Such construction, however, seems impossible under usual and natural rules of interpretation.

POINT V.

In the absence of express words the Court will not presume that Congress intended to lay an unusual and extraordinary burden upon a special occupation or class of persons, and, if the statute be ambiguous, that construction will be adopted which is most just and reasonable and which will avoid this conclusion.

In spite of the agrarian arguments which have been used in respect to this tax, there can be no doubt that the Act of 1898 was a revenue act. The great purpose of Congress in that act was certainly the raising of funds to meet a sudden and unexpected necessity which the war just entered upon had created. Doubtless the Legislature had also a secondary purpose in view, namely, that the burden should fall where it could most easily lie. As was said by Edmund Burke, a tax skillfully disguised will be accepted with tolerance and complacency, which, if openly applied, would cause a revolution.

"In the construction of the revenue laws special consideration is of course to be had of the purpose for which they are enacted. That purpose is to supply the government with a revenue. But in the proceedings to obtain this it is also intended that no unnecessary injury shall be inflicted upon the individual taxed. While this is secondary to the main object—the impelling occasion of the law—it is none the less a sacred duty. Care is taken in constitutions to insert provisions to secure the citizens against injustice in taxation, and all legislative action is entitled to the presumption that this has been intended."

Cooley on Taxation, 2nd Ed., p. 265.

It requires very little demonstration to show what a heavy and extraordinary burden this stamp tax, if enforced as appellant demands, would place upon the express business. It is estimated that the amount the tax produces annually from express shipments reaches a sum almost equal to three per cent. of the entire capitalization of the express companies in the country. The capital of Wells, Fargo & Company is $8,000,000; on which it has for some years paid an annual dividend of six per cent. The company does a banking as well as an express business, at least half of its capital being invested in that pursuit, and the dividends paid on its stock are derived to a large extent from that

source. On this banking business the company pays an annual tax of $14,000 under the new Revenue Act. In addition to this, like every important business house, it contributes a large annual sum under other provisions of the act. The company in its express department carried last year about 16,000,000 packages, on which the tax amounted to $160,000, a sum equal to two per cent. on its entire capital stock, and to more than three per cent. on that portion of it invested in the express business; in other words, equal to more than 50% of its annual profits as a carrier. Here, again, we would say that these facts are not pleaded, but Congress may be held to have known of them if it knew what appellant claims it did know.

We submit that it is not to be believed that Congress would thus single out any legitimate and useful business, especially a business the thorough performance of which is so necessary to the whole public, as the mark for such a tremendous and altogether unprecedented burden. And when it appears that this same tax, if distributed among all the shippers in a natural and logical way, would fall with imperceptible weight upon any of them, we submit that if the language be ambiguous, and we assert that it is not, the statute should be construed in such a way as to attain this just and reasonable result. The construction demanded by appellant would work great hardship and injustice, and certainly violate the spirit, if not the letter, of the constitutional provision enjoining uniformity in taxation. The true rule is that, while the intent must be sought, it is the intent as evidenced by the instrument itself. We cannot guess what Congress meant. We must construe what it meant by what it said.

"* * * It is, as I conceive, a general rule in the interpretation of all Statutes levying taxes or duties upon subjects or citizens not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out, although

standing upon a close analogy. * * * Burthens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import."

STORY, J., in U. S. vs. Wigglesworth, 2 Story, 369, 373.

"I see no reason for being astute to introduce difficulties into an act of Parliament which read simply and, according to the ordinary rules, is free from them."

Lord COLERIDGE, C. J., in Iles vs. West Ham Com., 8 Q. B. Div., 69, 78.

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

FULLER, C. J., in Lau Ow Bew vs. U. S., 144 U. S., 47; 12 Sup. Ct. Rep., 517, 520.

Ex parte Crow Dog, 109 U. S., 556; 3 Sup. Ct. Rep., 39.

Rector vs. U. S., 143 U. S., 457; 12 Sup. Ct. Rep., 511.

Varick vs. Briggs, 6 Paige (N. Y.), 323.

"It is presumed, in the construction of general words or dubious provisions, that there is no intention to depart from any established policy of the law."

Sutherland on Statutory Construction, Sec. 333.

"To compel individuals to contribute money or property to the use of the public without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is to levy a forced contribution, not a tax, duty or impost, within the sense of these terms as applied to the exercise of powers by any enlightened or responsible government."

Woodbridge vs. City of Detroit, 8 Mich., 274, 301.

"Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."

MARSHALL, C. J., in U. S. vs. Fisher, 2 Cranch, 358, 390.

The construction of a statute which attributes to the Legislature the exercise of a doubtful power will not, in the absence of direct words, be readily adopted.

Mardre vs. Felton, Phil. Law. (N. Car.), 279.

The act should be so construed as to effectuate its purpose.

The chief purpose of the act was the raising of revenue to meet a sudden and severe demand. It is therefore desirable to determine in which way the act should be construed to give effect to the intent of Congress.

It is clear that if this tax be fastened upon the carrier in such a way that he is unable to shift it from him by raising transportation rates, he will be obliged to reduce the other costs of operating his business and to retrench in every possible way in order to meet the extra expense. No act could avoid this effect. No laws could prevent this retrenchment. The result would be that the carrier's routes which do not pay well would be given up altogether; that the whole service of the carriers would be seriously crippled, and that small carriers, or some of them, would be obliged to give up their business altogether. Not only would the public get poor service, but the revenue would be most seriously diminished. If then, the construction which appellant asks for is placed upon the act, its chief purpose will be defeated.

LAST POINT.

For these reasons it is respectfully submitted that to the questions certified by the Circuit Court of Appeals it should be answered that the War Revenue Act of June 13, 1898, imposes the tax upon the transaction of shipment, leaving it to be paid indifferently by either party thereto.

CHARLES B. ALEXANDER,
Of Counsel for Wells, Fargo and Company.

Supreme Court U. S.
FILED
OCT 31 1899
JAMES H. McKENNEY,
Clerk

No. 248.

Brf. of Steele, Guthrie & Beecher, for Appellee.

STAMP TAX ON EXPRESS RECEIPTS.
WAR REVENUE LAW OF JUNE 13, 1898.

Filed Oct. 31, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 248.

WILLIAM CRAWFORD,
Appellant,

vs.

WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company.

BRIEF FOR APPELLEE.

CHARLES STEELE,
WILLIAM D. GUTHRIE,
THEODORE S. BEECHER,
Of counsel for appellee.

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BRIEF FOR APPELLEE.

The cause comes before this court on a certificate from the United States Circuit Court of Appeals for the Second Circuit requesting instructions upon the following questions of law:

"(1) Does the war-revenue act of June 13, 1898, impose upon the carrier exclusively the tax represented by the stamp to be affixed to each bill of lading, manifest or other evidence of receipt, required to be issued to each shipper of goods accepted by the carrier for transportation, or does it impose the tax merely upon the transaction of shipment, leaving it to be paid indifferently by either party thereto?

(2) If the war-revenue act of June 13, 1898, does impose such tax exclusively upon the carrier, does it preclude the carrier, who is by such act required to issue to each shipper a bill of lading, manifest or other evidence of receipt, from relieving itself of the expense of affixing and canceling the stamp required to be attached to such bill of lading, manifest or other evidence of receipt?" (Record, page 1.)

Since July 1, 1898, when this provision of the War Revenue Act took effect, the express company has quoted its rates plus the war-revenue stamp, and has required the shipper as a condition of accepting goods for transportation, either to provide or pay for the cost of the stamp on the bill of lading or receipt issued therefor in addition to the customary rates previously charged for the service.

The suit is for an injunction to restrain the express company from refusing to accept express packages from appellant for transportation, except upon compliance with this condition. The right to such relief, it was claimed, arose under the terms of the Act, which, the appellant insisted, imposes the tax exclusively upon the express company, and not only requires its payment by the express company in the first instance, but by implication prohibits the company from reimbursing itself for such tax by exacting payment thereof from the shipper.

The company contended, on the other hand:

(1) That the Act does not require payment of the tax by the company even in the first instance, but on the contrary provides explicitly that it may be paid indifferently by either the carrier or the shipper.

(2) That even if the Act required payment by the company in the first instance, it did not in express terms prohibit the company from relieving itself of the expense by adding the tax to the rates previously charged.

(3) That consequently the company was entitled to collect the tax from the shipper as part of its charge, for its right to fix its own charges was not abrogated by the statute.

The court below dismissed the bill on the ground that the War Revenue Act contained no provision limiting the carrier's common-law right to freedom of contract,

in respect to its charges for carriage, and that in the absence of an express provision no inhibition could be inferred. The plaintiff thereupon appealed to the Circuit Court of Appeals for the Second Circuit, where, after consideration and submission of briefs by counsel, the questions of law above stated were certified to this court for instructions.

The questions presented, while of little consequence to the appellant, are of vital importance to the express companies. Even the appellant, who conducts one of the largest department stores in the city of New York and is consequently among the largest shippers of express packages in the United States, at a liberal estimate would have to pay only about $350 a year, an item that would not be perceptible in the enormous business transacted, and which besides would naturally be collected from his customers and thus become still more widely distributed and consequently less oppressive. But to the express companies the case is one involving almost their existence. It is estimated that this tax will aggregate annually over $1,600,000, or nearly three per cent. upon the entire aggregate capital of all the express companies, amounting to $55,000,000. It will amount to from thirty to fifty per cent. of the entire net profit from the express business. In the case of the particular package tendered by the appellant, it would have amounted to nearly fifty per cent. of the net profit. It is doubtful whether the business could survive such a burden. To sustain the appellant's contention it must be held that Congress has seen fit, under the guise of an act to provide revenue, but for no apparent reason, to single out the express companies for the imposition of what would in effect amount

to a tax of from thirty to fifty per cent. of their net income from the express business.

It is submitted that such an extraordinary conclusion will not be accepted unless the language of the Act is so plain as to leave no possibility of escape.

What possible motive can be ascribed to Congress for imposing upon the express companies such an unreasonable proportion of the common burden of the war. The purpose of the Act was "to provide ways and means to meet war expenditures." Surely, this purpose was fulfilled when the necessary revenue was provided. It would be in no respect better served by denying to any class the inherent right of shifting the burden in accordance with the immemorial usages and customs of trade and business. It is no doubt the duty of the legislature, in determining upon a method of taxation for such a purpose, to select that which will be least oppressive and most fairly and equitably distribute the burden, and it will be presumed that such was the intention of Congress in the present instance. That duty is best fulfilled by the widest possible distribution of this tax among the public, and not by concentrating its burden upon the express companies.

In *Cooley on Taxation*, 2d Ed., p. 265, it is said:

> "In the construction of the revenue laws, special consideration is of course to be had of the purpose for which they are enacted. That purpose is to supply the government with a revenue. But in the proceedings to obtain this it is also intended that no unnecessary injury shall be inflicted upon the individual taxed. While this is secondary to the main object—the impelling occasion of the law—it is none the less a sacred duty. Care is taken in constitutions to insert provisions to secure the citizen against injustice in taxation, and all legislative action is entitled to the presumption that this has been intended. We are therefore at liberty to suppose that the two main objects had in view in framing the provisions of any tax

law were, *first*, the providing a public revenue, and, *second*, the securing of individuals against extortion and plunder under cover of the proceedings to collect the revenue."

So long as the revenue is provided, it is a matter of indifference to the government upon which party to the taxed transaction the burden finally remains. And such has been the view officially announced by the government and adopted by the Federal Courts. In a letter of the Attorney-General addressed to counsel for the express companies, in answer to the direct question, it is said:

"Replying to your letter of the 13th inst. I have the honor to advise you that the attitude taken by the Department of Justice with reference to the question as to which party, the shipper or the Express Company, under the war revenue bill, is required to furnish and pay for the revenue stamp which is required to be placed upon the manifest or bill of lading, is that this is a matter entirely between the shipper and the company. This office holds that so far as the Government is concerned it is only interested to know that the lawful tax is paid. As between the shipper and the Express Company, I have decided that the matter is not within my province of consideration under any case that has as yet arisen. The United States District Attorneys are instructed by this office that they may prosecute for the prescribed penalty any company which issues a manifest or bill of lading without the prescribed stamp; but that in controversies arising between shippers and express companies as to which one shall be required to bear the expense of the stamp, the Government has no direct concern under the war revenue law."

Letter of Attorney-General, Aug. 16, 1898.
Treasury Decisions (1898), No. 19,803, p. 234.
Treasury Decisions (1898), No. 19,833, p. 275.
U. S. v. Southern Express Co., U. S. Dist. Court for the Western District of North Carolina, October 27, 1898, unreported.

It has not been deemed necessary or useful to follow out and answer in detail the extended printed argument filed on behalf of the appellant. No attempt will there-

fore be made in this brief to reply categorically to the numerous propositions advanced, but the discussion will be confined to the questions upon which we submit the determination of the case must rest.

The argument divides itself naturally under the following heads:

I. The origin and nature of stamp taxes as indicating an intention that the tax should be widely distributed.

II. The indirect nature of the tax and the consequent presumption that it may be shifted so as to be borne ultimately by the consumer.

III. The proper interpretation of the Act.

IV. The right of the carrier to freedom of contract in respect of its charges for carriage.

I.

Of the origin and nature of stamp taxes.

By the political economists, stamp taxes, or stamp duties as they are more commonly termed, have uniformly been considered as belonging to the class of indirect taxes.*

They appear to have had their origin in Holland. In the struggle against the power of Spain, the States General had imposed every familiar form of tax, and finding them all unsatisfactory offered a reward to any one who would devise a new and practicable tax. The result was the invention of stamp duties by a private individual whose name is unknown. The system proved to be a very efficient method of taxation, for the taxes were at the same time inexpensive to collect, and were easily borne because widely distributed. Stamp duties were subsequently adopted

*E. R. A. Seligman, "Essays in Taxation," pp. 10, 11, 204; Adam Smith, "Wealth of Nations," Bk. V., Ch. II., Part 2, Art. 2, Appendix; J. S. Mill, "Principles of Political Economy," Bk. V., Ch. II.; C. F. Bastable, "Public Finance," p. 333; Leroy-Beaulieu, "Précis d'Economie Politique," p. 377; "Political Science Quarterly," September, 1898, p. 442.

in France and England, and have ever since continued in use as the most efficient means of obtaining revenue with the least unpopularity. They are not imposed upon any particular class, but upon transactions of commercial life, and those transactions are usually selected which are of most general and consequently most frequent occurrence. Thus not only is a large revenue obtained, but at the same time a wide distribution of the burden is accomplished.*

Stamp taxes in the United States have been coincident with all important wars, except the Mexican War, and were evidently resorted to on those occasions because of the sudden necessity of the Government for a largely increased revenue, and the desire that the burden of the war should be distributed as widely and equally as might be among the whole people and not imposed upon any particular class.†

The distinguishing characteristics of stamp duties thus appear to be that they provide a large revenue; that they bear upon no particular class, and that they accomplish the widest possible distribution of the burden.

It must require clear and direct language, therefore, to show that this Stamp Act was intended to impose a tax on the express companies, and not, as it purports, a general tax upon express receipts. Had Congress intended to tax the express companies or their business as is insisted in appellant's brief, there was no

* "History of Taxation and Taxes in England," S. Dowell, London, 1884, Vol. II., p. 62, Vol. III., pp. 322–3. "Treatise on Taxation and the Funding System," J. R. McCulloch, London, 1845, pp. 287–8. "Seligman's Essays on Taxation," pp. 10, 11.

† "An Act Laying Duties on stamped Vellum, Parchment and Paper." Laws 1797, Ch. XI.

"An Act Laying Duties on Notes of Banks," &c. Laws 1813, Ch. LIII.

"An Act to Provide Internal Revenue," &c. Laws 1862, Ch. CXIX.

"An Act to Provide Ways and Means to Meet War Expenditures," &c. Laws 1898.

need to resort to any such clumsy or roundabout method. The common form of exacting a percentage of their gross receipts could have been adopted, as was done in another section of the same Act in the case of the sugar companies and oil companies (War Revenue Act, Sec. 27), or if it was preferred to measure the tax by the number of shipments, periodical returns of all shipments could have been required, and the payment in a lump sum of a tax of one cent for each, as was done in the case of the telephone companies. The fact that resort was had to the device of a stamp tax—which is always intended to generalize the burden—demonstrates that there was no intention of imposing a tax upon the express companies or their business, but that it was contemplated that the tax should be imposed solely upon the express receipt which represents the transaction of shipment and so be distributed among the immense number of shippers, thus bearing but lightly upon any one person.

It is plainly requisite for the successful collection of a stamp tax that the transaction should be one evidenced by an instrument capable of being stamped, and, consequently, the transactions selected for such taxation are usually those which necessarily involve the creation of a document of some kind, to which a stamp may be readily affixed. Instances are found in checks, drafts, certificates of deposit, telegraph messages, written agreements, warehouse receipts, &c. In all these cases, the transaction cannot take place without the creation of the instrument, and in effect the instrument is the transaction. Hence the tax upon the instrument is a tax upon the transaction.

In none of the cases suggested does the law impose the tax upon either party to the transaction, but upon the transaction itself, leaving it to the agreement of the

parties, or the customs and usages of trade, to determine by whom it shall first be paid, and upon whom it shall ultimately rest.

But there are numerous transactions of frequent occurrence not necessarily evidenced by any document, *e. g.*, sales of stock certificates endorsed in blank, merchandise, etc. Such sales may be accomplished orally, and are completed by delivery of the thing sold, without any writing to which stamps could be affixed. Therefore, having determined to tax such transactions, it became necessary for Congress to make it obligatory on one party or the other to create a document evidencing the transaction, upon which a stamp might be affixed. Accordingly, the Revenue Act requires a memorandum of sale to be prepared in each case, and a stamp to be affixed thereto.

And so in respect of the express shipments selected for taxation. Such transactions are of very frequent occurrence, and by imposing a very small tax upon each, a large revenue could easily be raised which, being widely distributed, would be oppressive to no one. But it was not at all certain that in each case of shipment a bill of lading or receipt would be issued, and therefore difficulty might occur in collecting the tax, for the reason that there was no document which could be stamped. Consequently, a provision was embodied in the law making it the duty of every express company to issue a bill of lading or receipt in every instance in which it accepts a package for transportation, so that there should be always created a document evidencing the transaction and capable of being stamped. This was the sole purpose of the provision. It was not intended to determine who should pay the tax or who should affix the stamp, but solely to insure the

creation of a document upon which the stamp could be conveniently placed. The only object of the government was to secure the payment of the tax by some one. So long as the revenue was received, it was a matter of indifference to the government by which party to the transaction it was paid.

The fact, then, that the tax is in form a stamp tax, fairly raises a presumption against the claim that it was intended to be imposed on the express companies.

II.

Of the indirect nature of the tax.

Taxation generally, it may be said, is of two kinds; direct, where the requisition is addressed to the very person to be burdened; indirect, where the resources of the country in mass are reached through impositions upon the transactions of commercial life. This classification is recognized as existing in the scheme of taxation provided by the Constitution (*Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, 557; 158 U. S. 601, 619).

As this court said in the Income Tax Cases (157 U. S. 429, 557):

> "Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax after more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."

As pointed out above, stamp taxes fall under the head of indirect taxes, which, to sum up many definitions, do not fall upon an indicated class of persons, but, being collected through the medium of trade, commerce and manufacture, are paid by such of the whole people as avail themselves of the results of those transac-

tions.* It may be noticed here in passing that the proposition of the appellant's counsel that the stamp tax upon express receipts is not within the class of indirect taxes, but is a direct tax imposed upon the express company with a prohibition against its reimbursement from its shippers, argues his client out of court for this would compel the conclusion that the tax was unconstitutional for want of apportionment among the states.

It is of the very nature of an indirect tax that its burden should be shifted. It is never intended that such a tax should be borne ultimately by the one on whom it is imposed in the first instance. As stated by Mr. Mill:

> "Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs. The producer or importer of a commodity is called upon to pay tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."
>
> Principles of Pol. Ec., Book V., Ch. II., § 1.

> "Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes."
>
> *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 558.

Such has been history of excise taxes and duties ever since they were invented. The importer collects the duty which he has to pay the government by exacting a higher price for his goods; the distiller collects the revenue tax by imposing an additional charge upon his consumers; the tobacco manufacturer recoups himself for

*J. L. Laughlin, Elements of Political Economy, (1887), pp. 273, 274; C. F. Bastable, Public Finance, p. 333; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 558.

the governmental charge put upon his business by making his customers pay a higher price for the manufactured article; and here the carrier would undoubtedly be compelled to increase its rates if it had to bear the tax itself. All such taxes are borne at last by the consumer as an incident in the cost of the article which he consumes; and, indeed, where such taxes are imposed upon the manufacturer or importer it has been held by this court that they become, when paid, an element in the value of the article, and the seller or manufacturer may lawfully impose upon his customers an additional charge to recoup himself for the tax which he has been obliged to pay to the government (*Jones* v. *Van Benthuysen*, 103 U. S. 87; *United States* v. *American Tobacco Co.*, 166 U. S. 468, 476; *Ammidown* v. *Freeland*, 101 Mass. 303; *Cooley on Taxation*, p. 164.)

Precisely the same consideration would apply if the tax under consideration were expressly imposed upon the express companies. It would then become an item in the cost and value of such service, which the company would be entitled to collect from its shippers, just as the manufacturer collects from his customers the tax paid upon his tobacco.

Such has been the experience of other countries where similar taxes are imposed. Professor Seligman makes the following statement as the result of his researches (*Seligman's Essays in Taxation*, p. 204):

> "But the old 'tax on public conveyances'—a percentage on the fare—which dates from the last century, was extended in 1855 to the receipts from passengers and from express traffic. In practice, this 'public conveyance' or transportation tax is not a direct tax on the corporations, but an indirect tax on passengers and on consignors of express packages; for the tax is added to the price of the ticket or receipt and is paid by the individual."

It is not unusual to provide for the collection of such taxes by constituting the company a tax gatherer or instrumentality of collection, and in effect putting upon it the responsibility of seeing that the tax is paid by its patrons. And this has been held to be the proper construction even of acts which by their terms call for payment by the company. The substance and not merely the form of the act must be considered. As Chief-Justice Marshall said in *Brown* v. *State of Maryland* (12 Wheat. 419, 444):

> "But if it should be proved, that a duty on the article itself would be repugnant to the constitution, it is still argued, that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.
>
> It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution."

In *Crandall* v. *State of Nevada* (6 Wall. 35), the legislature of Nevada enacted that "there shall be levied and collected a capitation tax of one dollar upon every person leaving the state by any railroad, stage coach or other vehicle engaged or employed in the business of transporting passengers for hire" and that the proprietors, owners and corporations so engaged should pay the said

tax of one dollar for each and every person so conveyed or transported from the state. For the purpose of collecting the tax another section required a monthly report from all persons or corporations engaged in the business and the payment of the tax to the Sheriff or other proper officer. The court said, at page 39:

> "It is claimed by counsel for the State that the tax thus levied is not a tax upon the passenger, but upon the business of the carrier who transports him.
>
> "If the act were much more skilfully drawn to sustain this hypothesis than it is, we should be very reluctant to admit that any form of words, which had the effect to compel every person traveling through the country by the common and usual modes of public conveyance to pay a specific sum to the State, was not a tax upon the right thus exercised. The statute before us is not, however, embarrassed by any nice difficulties of this character. The language which we have just quoted is, that there shall be levied and collected a capitation tax upon every person leaving the state by any railroad or stage coach; and the remaining provisions of the act, which refer to this tax, only provide a mode of collecting it. The officers and agents of the railroad companies, and the proprietors of the stage coaches, are made responsible for this, and so become the collectors of the tax."

In the *Case of the State Freight Tax*, 15 Wall. 232, the court said at page 273:

> "Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their own roadway, but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority. In view of these provisions of the statute, it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported, or upon the consignor or consignee of the

> freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the State treasury is, in effect, only a tax-gatherer."

So, in the present Act, the tax is levied by Section 6 upon the various instruments mentioned in Schedule A, but payment is left to be made by either party to any of the transactions evidenced by such instruments. In order that some one shall be required to see that the tax is paid upon each express shipment, there are subsequent provisions which require the carrier to issue a bill of lading or receipt in every instance where goods are accepted for transportation, and yet another section imposes a severe penalty if the carrier shall permit a bill of lading or receipt to be issued without payment of the tax. By these provisions, the carriers are constituted the agents of the government for the collection of the tax, and the revenue of the government is thus assured.

Very similar in principle are the cases arising under laws which impose a tax upon the interest or dividends paid by a company, and which require the company to pay the tax, but authorize its deduction from the interest or dividend paid to the creditor or stockholder respectively. It is held that such taxes are not upon the company, but in reality are a tax upon the creditor or stockholder—so much so that, where a municipal corporation was the creditor to whom the interest was payable, it was held that the tax could not be collected from the railroad company, because, while in form imposed upon the company, it was in substance imposed upon the creditor; and the creditor being a municipal corporation could not be taxed (*U. S.* v. *Railroad Co.*, 17 Wall. 322, 327; *Stockdale* v. *Insurance Cos.*, 20 Wall. 323, 329, 330; *Henderson et al.* v. *Mayor of N. Y. et al.*, 92 U. S. 259,

274; *Brown* v. *Maryland*, 12 Wheat. 419, 444). The cases of *Barnes* v. *The Railroads*, 17 Wall. 294, *Bailey* v. *Railroad Co.*, 22 Wall. 63, and *Railroad Co.* v. *Slack*, 100 U. S. 659, relied upon by the appellant, are not in conflict with this view.

Again the fact that the tax is levied indiscriminately upon all receipts without regard to the nature of the shipment, its value, the distance carried, or the amount received by the carrier indicates that the tax is intended to be upon the transaction and nothing else. It is similar in principle to the tax under consideration in the *Case of the State Freight Tax* (15 Wall. 233.) There a tax of two cents was imposed upon each two thousand pounds of freight carried. The court said at page 272:

> "Upon what, then, is the tax imposed by the act of August 25, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the State treasurer for the use of the Commonwealth "on each two thousand pounds of freight so carried," a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it." * *

In *Telegraph Co.* v. *Texas*, 105 U. S. 460, the state enacted a law requiring every chartered telegraph company doing business in the state to pay a tax of one cent for every full-rate message sent, and one-half cent for every message less than full rate, the tax to be paid quarterly to the Comptroller of the state on sworn statements made by an officer of the company; and yet the court held that this was a tax on the telegraph messages, and not upon the company. At page 465 it was said:

> "The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent the tax must be paid, and the amount determined solely by the class to which it belongs."

See, also, *Welton* v. *State of Missouri*, 91 U. S. 275; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Webber* v. *Virginia*, 103 U. S. 344; *State Tonnage Tax Cases*, 12 Wall. 204; *Peete* v. *Morgan*, 19 Wall. 581; *Cannon* v. *New Orleans*, 20 Wall. 577; *Inman Steamship Co.* v. *Tinker*, 94 U. S. 238.

If the tax under consideration in the State Freight Tax case was held to be a tax on the freight "because carried," and the tax in the telegraph case a tax on the message "because sent," the tax on express receipts must be held to be a tax upon the shipment "because made."

Even if, therefore, the Act by its terms imposed the tax upon the express companies in the first instance, the presumption would be that this was only done as a method of collecting the tax and with the intention that the express companies should reimburse themselves from their shippers.

The situation of the express companies would be most grave if they were compelled to lose the amount of this tax. They are already subjected to unusually heavy state taxation (*Adams Express Company* v. *Ohio*, 165 U. S. 194; *Adams Express Company* v. *Kentucky*, 166 U. S. 171). The number of packages ordinarily shipped over the lines of The Adams Express Company alone exceeds 90,000 per day, or more than 28,000,000 of such packages per year. The tax upon this would be over $280,000, or nearly 2½ per cent. upon the nominal or par value of the $12,000,000 of capital of The Adams Express Company. Such a tax, if imposed on the express company, would be evidently unreasonable and excessive, but when borne by the shippers it becomes comparatively

trifling. As suggested above, what reasonable motive could be imputed to Congress for the imposition of such a burden upon the express companies? The purpose of the Act was to provide revenue and not to oppress or destroy any particular class or occupation. This purpose is fulfilled by a stamp tax which by the operations of business is distributed over the whole community. It would not be aided by a requirement which would prohibit such an equalization of the burden. The express business is reached, as is every other business, through the many indirect impositions of the Act. No justification can be shown for imposing upon them any different rule of contribution from the rest of the community.

It is stated in appellant's brief that railroad companies for the most part are paying the tax upon their bills of lading and not exacting it from the shippers. We are by no means prepared to admit that such is the fact, but if it were true it would be quite immaterial to this discussion. The express business differs radically from that of the railroads. It consists in forwarding a great many small packages, usually for short distances, so that the average charge per package is very small. Consequently, a tax of one cent for each package amounts to a large percentage of the gross revenue received.

The railroad business, on the contrary, for the most part covers heavy shipments and for long distances, so that the average rate received is so large that a tax of one cent upon each shipment is comparatively unimportant and may readily be assumed by the companies without serious loss or inconvenience. A tax of one cent upon an average rate of twenty-five or fifty cents might be very burdensome, although the same tax upon a rate of one or two hundred dollars might be insignificant.

III.

Of the proper interpretation of the act.

As pointed out above, even if the Act itself were silent on the subject, it would be a reasonable inference that the ultimate payment of a stamp tax such as that in question, imposed upon the transaction of shipment, was left to be regulated by agreement between the parties to the transaction, or by the usages and customs of business, as is the case with stamp taxes generally. But in this instance there is no room for mere inference, for an examination of the provisions of the Act will show conclusively that the question is not left open for construction, but it is provided in express terms that the tax may be paid indifferently either by the carrier or shipper.

The only section which imposes the tax is Section 6, which provides:

> "That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this Act, or for and in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed *by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued*, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."
>
> *Act of June 13, 1898, c. 448*, 30 Stat., p. 451.

In other words, all the stamp taxes upon documents mentioned in Schedule A may be paid by either the person who issues the document, which, in the case of express companies, would be the company, or by the person for whose use or benefit the document is issued, and that is, in the case of express shipments, the shipper. There is

no room for argument on this point. The provisions of the section are clear and unambiguous, and the appellant practically admits that if this provision stood alone no question could be made but that the tax was left to be paid indifferently by either the carrier or the shipper. The appellant, however, insists that the effect of the clause in Schedule A entitled "Express and Freight" is to abrogate the provisions of Section 6 in regard to the stamp tax on bills of lading, and, in terms, to impose the payment of this tax directly and exclusively upon the express companies. The clause in question is as follows:

> "EXPRESS AND FREIGHT: It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and cancelled, as is in this Act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."
>
> *Act of June 13, 1898, c. 448*, 30 Stat., p. 459.

Although clearly no tax is imposed by this section, the appellant nevertheless argues that inasmuch as it is thereby made the duty of the express company to *issue* a bill of lading or receipt, which bill of lading or receipt is required to bear a stamp, therefore it is the duty of the express company to bear the whole burden of the tax and

to affix and pay for the stamp which must be attached to the bill of lading or receipt *after* it is issued; for, the appellant insists, otherwise the instrument would not be legal, and it cannot be assumed that Congress would require the express company to issue an unstamped document for which it would be subject to penalty under the law. And it is urged that the effect of this clause is to override the plain provisions of Section 6, and to impose on the express company a duty in connection with the payment of this tax which does not attach to any other transaction included in Schedule A.

The question occurs at once, why, if this had been the intention of Congress, such an ambiguous (to say the least) form of expression should have been adopted, when it would have been easy to state plainly that the tax was intended to be borne by the express companies, as in the case of the tax on sleeping and parlor car companies, imposed by Section 28, where the language is, "the stamp to be affixed to the ticket and paid *by the company issuing the same;*" or, in the case of the matters referred to in Schedule B of the Act, in regard to which Section 20 provides that the stamps shall be *affixed by the person subject to the tax therein provided.* It would have been more natural, had such been the intention of Congress, to have used the same form of expression in regard to the affixing and payment of the stamp as was employed in regard to issuing the bill of lading or receipt, thus: "It shall be the duty of every * * express company * * to issue * * a bill of lading * * and to attach thereto and cancel a stamp, &c., &c." But it will be observed that, instead of adhering to the same form of language, a semicolon is inserted, and there is an entire change in the method of expression. The clause begins:

> "It shall be the duty of every * * express company * * to issue * * a bill of lading;" * *
>
> 30 Stat., p. 459.

Then follows a semi-colon, and after that, instead of saying "and it shall be the duty of such express company to attach and cancel the stamp," the Act changes to an impersonal form of expression and says:

> "and there shall be duly attached and cancelled, * * a stamp," &c.

Had Congress intended to impose on the express company the duty of attaching and canceling the stamp, as it had just imposed the duty of issuing the bill of lading, it is inconceivable that the form of expression would have been changed. Plainly, the change in expression must have been adopted for the deliberate purpose of expressing a different meaning—namely, that, while the duty of issuing the bill of lading devolved upon the carrier, the duty of attaching and canceling the stamp and paying the tax was left, like the other taxes enumerated in Schedule A, to be performed by either party to the transaction, as provided in Section 6.

But it is quite evident from other considerations that the clause is not susceptible of such a construction as the appellant asserts. His main reliance seems to be placed upon the concluding sentence, which provides that any failure to issue a bill of lading shall subject the carrier to a penalty of $50 for each offense; and it is argued that the words "such bill of lading" there employed mean a bill of lading with a stamp duly attached and canceled, and that, inasmuch as a penalty is imposed upon the carrier for failure to issue such a bill of lading, therefore by inference the intention must have been that the obligation both to issue and stamp the bill of lading was to rest upon the carrier.

This argument proceeds upon a false premise. It assumes that the penalty of $50 mentioned is intended to be imposed upon the carrier for failure *to affix and cancel the stamp* required to be put upon the bill of lading. But such is not the correct construction. This penalty is imposed, not for the failure to stamp the bill of lading, but for *failure to issue or create a bill of lading* which can be stamped. The failure to stamp is subject to a different and much more severe penalty, as will presently be pointed out. The purpose in attaching a penalty to the failure to issue or create a bill of lading or receipt, without regard to its being stamped or not, is evident. As pointed out above, it is essential to the successful collection of stamp taxes that a document be created evidencing the taxed transaction, in order that a stamp can be affixed thereto. Unless such a document is created, the transaction is not readily available for stamp taxes, but a tax must be imposed in some other way. So, when Congress determined to impose a stamp tax upon express shipments, it became necessary, in order to facilitate and ensure the collection of the tax, that a document should be created, upon which a stamp could be placed, and this was secured by imposing upon the carrier a penalty of $50 for each failure to issue a receipt for any shipment of goods accepted for transportation. The only and unmistakable object of this penalty was, therefore, to insure the creation of a document which could be stamped, and it was in no wise intended as a penalty for a failure to stamp the document *after* it had been brought into existence.

Much stress is laid by the appellant upon the use of the word "issue" in connection with the bill of lading; but plainly it is used in this connection in the sense of

create, and has no reference to the final delivery of a stamped instrument to the shipper. The correctness of this view is conclusively established by a reference to the debate in the Senate, where a colloquy took place between Senator Gorman and Senator Aldrich, who was in charge of the bill. The following occurred:

"MR. GORMAN. * * I read, beginning at line 10, on page 41:

"'Any failure to issue such bill of lading, manifest, receipt, or other memorandum shall subject such railroad company, carrier, express company, or corporation or person to a penalty of $50 for each offense.'

"MR. ALDRICH. The Senator from Maryland certainly misapprehends the language there or he has not read it carefully. That is the penalty for not issuing a bill of lading.

"MR. GORMAN. Yes.

"MR. ALDRICH. The penalty for not putting a stamp upon one when issued is a penalty which is applied in another way.

"MR. GORMAN. But it is the same thing precisely.

"MR. ALDRICH. I beg the Senator's pardon. That is simply a provision that every railroad company must issue a bill of lading, and failing to do that, it must pay a fine of $50. As to what the penalty shall be for failing to stamp it after issue is another question entirely."

Congressional Record, Vol. 31, p. 5627.*

It is thus apparent that this clause has reference merely to the issuance of the bill of lading, and that the issuance there referred to is the creation of the document, and has no connection with the question of affixing or paying for the revenue stamp thereon. The appellant's argument therefore falls to the ground; and, indeed, if correct it would result necessarily in a manifest absurdity. For precisely the same form of expression is used in the concluding paragraph of the sentence, where it says:

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* As to the references to the debates as interesting although not controlling sources of information, see *United States* v. *Wong Kim Ark*, 169 U. S. 649, 699; *Dunlap* v. *United States*, 173 U. S. 65, 75.

> " and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

Under the appellant's construction the words "such bill of lading" are to be interpreted as meaning a "stamped bill of lading," so that the clause would read:

> " Any failure to issue *such stamped bill of lading* * * shall subject such * * express company * * to a penalty of $50 for each offence, and no *such stamped bill of lading* * * shall be used in evidence unless it shall *be duly stamped* as aforesaid."

Such a result is nonsensical, and yet it is unavoidable if the appellant's contention be correct. The only reasonable interpretation of this clause must be, therefore, that it is made the duty of the express company to issue (or create) a bill of lading or receipt, that the amount of the tax thereon is fixed at one cent for each receipt, and that the express company is subject to a penalty of $50 if it accepts any shipment for transportation without issuing or creating a receipt therefor upon which a stamp may be conveniently affixed. Suppose the express company did issue an unstamped receipt, can any one imagine that this penalty of $50 could be imposed for that offense?

The correctness of this interpretation is conclusively shown by reference to other provisions of the Act. Sections 7 and 13 of the Act provide for the penalties to be imposed for issuing a receipt *unstamped*. Here we find not merely a penalty of $50, but under Section 7 the offense is made a misdemeanor punishable by a fine of not exceeding $100, and under Section 13, if committed with intent to evade the law, a fine of $50 and imprisonment not exceeding six months, or both, in the discretion of the court. This, of itself, makes it certain that the clause above quoted from Schedule A has no reference to the failure to *stamp* a bill

of lading *after* it is issued. The penalty here is a very different one, and much more severe than for the mere failure to issue a bill of lading. It is preposterous to assume that two such different consequences as the penalty provided in the express and freight clause, and the much more serious penalties provided in Sections 7 and 13 were intended to apply indifferently to one and the same offense.

In neither Section 13 nor in Schedule A, nor in Section 7 is there a single word indicating by whom the stamp shall be affixed, or by whom the cost thereof shall be defrayed. The impersonal form of expression is sedulously adhered to all through the Act. The utmost effect that can reasonably be claimed for Sections 7 and 13, is that, as pointed out above, they indirectly impose upon the carrier the responsibility of seeing that the stamp is paid before a bill of lading or receipt is finally issued and delivered to the shipper. They do not make it his duty to affix or pay for the stamp, but they do punish him for issuing a document without the same being stamped. From this appellant argues that the express company must pay for the stamp and itself affix it to the bill of lading or receipt. No such argument can be founded thereon. The law prohibits the transaction of shipment unless a bill of lading is issued and stamped; but nowhere in the law is there a word imposing upon the carrier the duty of supplying or affixing the stamp. The carrier is merely constituted a tax collector for the government (*Crandall* v. *State of Nevada*, 6 Wall. 35, 39; *State Freight Tax*, 15 Wall. 232, 273). If the carrier and the shipper cannot agree as to who shall bear the expense of this requirement of the law, the only result which must follow is that the transaction of shipment cannot occur. There is certainly no

more warrant for the shipper insisting that the carrier shall pay the tax than there is for the carrier to insist that the burden must be borne by the shipper.

The difference in the language employed in connection with the taxes imposed under Schedule B of the Act from that used in reference to Schedule A emphasizes the correctness of the interpretation above set forth. By the first paragraph of Section 6 it is provided that the taxes under Schedule A shall be paid *by either one or the other* of the parties to the transactions therein referred to; but in the second paragraph, which refers to the taxes provided in Schedule B, no such alternative provision is found. Again, we find in Section 13, which imposes penalties for infractions of Schedule A, that the impersonal form of expression is adhered to—that is to say, the penalty is imposed upon the person who shall issue a document, "*without the same being duly stamped*," and not upon the person issuing the document "*without stamping*." But when we come to Section 20, which imposes a penalty for failure to pay the taxes provided in Schedule B, a different form of expression is again used, and the law provides that "any person * * who shall make, prepare, and sell * * drugs, medicines, &c., * * upon which a tax is imposed by this Act, as provided for in Schedule B, *without affixing thereto* an adhesive stamp or label denoting the tax," shall be deemed guilty of a misdemeanor, &c. Here, again, the distinction, sedulously adhered to throughout the law, is emphasized and the proposition even more clearly demonstrated that, where the intention of Congress was to require payment of the tax specially by any one of the parties to a transaction, peculiarly apt language was employed to indicate its purpose.

Moreover, even if the Act contained a requirement that

the stamp should be affixed by the express company, that would not necessarily imply an intention that the tax represented by the stamp should be paid and borne ultimately by it. The affixing and canceling of the stamp is merely the method of collecting the tax. The real subject of the tax must be ascertained by a consideration of the purpose and effect of the Act as distinguished from its mere form (*Brown* v. *Maryland* and cases cited under Point II. above.)

In *Attorney-General for Quebec* v. *Queen Insurance Co.*, 3 App. Cas., 1090, the question arose as to the interpretation of the act of the legislature of Quebec, which required every assurer carrying on business in that province to take out a license each year. The act provided that the price of the license should consist in the payment to the Crown for the use of the province, at the time of the issue of the policy and at the time of the making or delivery of each premium, receipt or annuity, of a sum computed at the rate of three per cent. as to assurances against fire, or of one per cent. as to other assurances, for each $100 of the amount received as premium or renewal of assurance. Such payment was required to be made "by means of one or more adhesive stamps equivalent in value to the amount required, to be affixed by the assurer, his agents, officers or employees on the policies of insurance, receipt or renewal, as the case may be." In spite of this direct language of the act, the court held that, while in form the tax was a license tax, it was in reality merely an ordinary stamp tax to be paid by anybody who wanted a policy. At page 1098 the court said:

> "It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that the company buys the adhesive stamps and affixes them;

> or it may be that the assured buys the adhesive stamps and affixes them or pays an officer of the company the money necessary to purchase them and affix them; but whoever does it complies with the Act."

Another and conclusive argument is found in Section 28 of the Revenue Act, which imposes a tax upon parlor and sleeping car companies. There no impersonal form of expression is employed as in the case of the express and freight clause, but the language is plain and direct:

> " the stamp to be affixed to the ticket and *paid by the company issuing the same.*"

If the result of the general language employed in the express and freight clause of Schedule A were to impose the tax there specified on the carrier, surely it would have been unnecessary to provide a separate section, entirely apart from Schedule A, to cover the tax upon the parlor and sleeping car companies. They could have been included much more consistently with the other transportation companies. But the very fact that Section 6 applied to *all* the stamp taxes provided for by Schedule A, and permitted their payment to be made indifferently by either party to the various transactions upon which the tax was laid, made it necessary to omit the parlor and sleeping car companies from that section of the Act, and to include them in a special section to which the provisions of Section 6 would have no application.

It is evident, therefore, that the appellant's argument has no foundation in the language of the express and freight clause, but is absolutely inconsistent with the whole scheme of the Act. It can be supported only upon the assumption that, although Congress had particularly in mind the subject of requiring payment of taxes by special parties to transactions, and provided for it in several instances, nevertheless in this particular instance it

deliberately abandoned the plain, simple and familiar language which would have made its purpose evident, and adopted a form of expression incapable of any such interpretation.

Reliance is placed by the appellant upon a comparison of the present Act with the former Stamp Acts of 1862–4 but that comparison so far as it is useful for any purpose, serves only to confirm the views above expressed.

The appellant has overlooked the essential difference between the two Acts. The tax imposed by the Act of 1862 was graduated, increasing with the carrier's compensation, thus indicating perhaps more of an intention that the tax in the first instance at any rate should be paid by the express company. But, more than this, by a separate section of the Act the companies were directly required to affix the stamp (Laws 1862, ch. 119, §105, 12 Stat. at Large, p. 478). The tax was found so burdensome and inconvenient that it was almost immediately changed to a tax on gross receipts (Laws 1863, ch. 74, § 10, 12 Stat. at Large, p. 722; Laws 1864, ch. 173, §104, 13 Stat. at Large, p. 276). It is hardly possible to conceive that if Congress now intended to tax the express companies it would again resort to the form of a stamp act which was found so burdensome and inconvenient as to compel its repeal in 1864.

A comparison of the two Acts strengthens the view that Congress deliberately altered the arrangement which existed under the Act of 1862, and included the tax upon express receipts under Schedule A so as to leave no room for the contention that anything was intended different from an ordinary stamp duty, to be paid, as provided by Section 6, like all the other stamp

duties covered by that section, indifferently by either party to the transaction.

The War Revenue Act was for a long time under discussion in Congress, and it is interesting and useful to observe the course of the discussion upon the various provisions, and particularly the statements of the members of the committee who were in charge of the bill, and the actual changes which were made in the Act from time to time. Thus, when the question was presented as to imposing a tax upon the checks or tickets given out by parlor or sleeping car companies for berths or seats, the section as proposed read as follows:

> "That from and after the 1st day of July, 1898, a stamp tax of one cent shall be levied and collected on every seat sold in a palace car and on every berth sold in a sleeping car, the stamp to be affixed to the receipt given for each seat or berth so sold."
>
> *Congressional Record*, Vol. 31, p. 6161.

It was objected that this provision did not require payment of the tax by the sleeping-car companies, but left it open to be collected either from the companies or their passengers, and that, in order to have the companies pay the tax the Act should contain a clear provision for that purpose. Accordingly, this section was amended so as to read as follows:

> "That from and after the 1st day of July, 1898, a stamp tax of one cent shall be levied and collected on every seat sold in a palace or parlor car and on every berth sold in a sleeping car, *the stamp to be affixed to the ticket and paid by the company issuing the same.*"
>
> *Congressional Record*, Vol. 31, pp. 6160, 6161.

It is evident that Congress here had clearly in mind the necessity of using plain and direct language, if it was desired that the tax should be paid in the first instance

specifically by one of the parties, and not indifferently by either.

Even more instructive are the debates in regard to the clause contained in the express and freight section itself, on which the appellant relies, providing that

> "but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment."
>
> *Act of June 13, 1898, c. 448*, 30 Stat., p. 459.

As originally drafted, the express and freight section did not contain this clause, but a committee of newspaper men made an earnest appeal to the committee in charge of the bill, urging that if some such clause were not inserted, the burden imposed by the law upon the publishers of newspapers would be very great, because of the great number of separate packages usually contained in one bundle in making shipments of newspapers by express. No suggestion was made by anyone that the express companies would have to pay this tax, but on the contrary the amendment was adopted at the request of the newspaper publishers and solely for their benefit.

Congressional Record, Vol. 31, pp. 6168, 6172.

It is evident, therefore, that Congress supposed and intended that this tax was to be paid not by the express companies, but by the shippers, for otherwise there would have been no reason for inserting the clause referred to above, and the newspaper publishers would simply have been told that the tax did not affect them, but was required to be paid by the carriers.

IV.

Of the carrier's right to freedom of contract in respect of its charges for carriage.

As suggested above, if the Act could be interpreted as imposing the tax exclusively upon the express com-

panies, they may nevertheless lawfully add the amount to their former customary rates or charges. The appellant by the force of this argument is driven to the untenable position that the War Revenue Act, not only must be construed as imposing a tax specially upon the express companies, as distinguished from a general stamp tax on express receipts, but that it must be held to contain an implied prohibition against the express company reimbursing itself for the tax by treating it as an expense of the business; in other words, that the carrier's common-law right to charge what it will, subject only to the limitation of reasonableness, is abrogated by the Revenue Act to the extent of the tax imposed upon express receipts, and that whether the carrier's rates were previously unreasonably high or low is not material, because, so the appellant argues, this law implies that the amount of the stamp tax must be deducted from the carrier's profits, and impliedly prohibits the carrier from relieving itself of that expense. It is submitted that the carrier's common law right to fix its own charges for carriage cannot be thus abrogated. It would require a direct, clear and positive enactment to warrant any such assumption as to the intention of Congress.

It should be observed that The Adams Express Company is not a corporation, but is a mere joint-stock association of individuals, analogous to a partnership (*Complaint*, paragraph II., record, page 3; *Chapman* v. *Barney*, 129 U. S. 677; *Taft* v. *Ward*, 106 Mass. 518; *Gregg* v. *Sanford*, 65 Fed. Rep. 151, 153; *Platt, etc.*, v. *Colvin et al.*, 50 Ohio St. 703). It enjoys no franchise, it exercises no powers granted by any state; it merely carries on a business which may be transacted by any individual, and there is no public duty imposed upon it any

more than the duty imposed upon every individual common carrier, to carry for all for a reasonable compensation. (*Defendant's answer*, paragraph VI., record, page 9.) What this compensation should be must depend upon all the circumstances going to make up the service rendered; but, even in the case of corporations whose only right to receive compensation is derived from legislative grant, it must always be sufficient to allow the carrier a reasonable profit (*Chicago, &c., Railway Co.* v. *Minnesota*, 134 U. S. 418 458; *Smyth* v. *Ames*, 169 U. S. 466, 546). Where the carrier is a private association whose right to compensation for services rendered depends upon no consideration of public grant, its right to fix the rates for such compensation is less restricted, and is limited only by the power of the states to prevent unreasonable charges.

But no issue is raised in this suit as to whether the charges of the express company, with or without the addition of the stamp tax, are reasonable or unreasonable. The defendant company's answer under oath alleges their reasonableness both before and since the passage of the War Revenue Act (record, p. 13). The appellant's contention seems to be that, without regard to any consideration of reasonableness or unreasonableness, the Act prohibits the company from exacting the payment of the stamp tax from the shipper in addition to the rates which it had been accustomed to charge for many years before.

Much emphasis is laid on the claim that the express company has not in form increased its rates, but that it continues to charge the same rate, and in addition exacts the tax from the shipper as a separate item. This is a mere play upon words. By whatever name it may be called, the fact is that since

July 1, 1898, the company has compelled the shipper to pay twenty-six cents for a service which prior to that date had been rendered for twenty-five; and so with all its other charges. The mere fact that the charge is collected in two items, instead of one, is of no importance.

In any view, it must be assumed for the purposes of this suit that the aggregate rate charged by the express company since July 1, 1898, is a reasonable rate, for the express company has collected from the shipper only the exact amount of additional expense which has been imposed upon express shipments by the Revenue Act. Even if the appellant's contention that this tax is imposed upon the company were correct, the company has merely added to its charge the additional expense created by the Act, and its profit in the transaction remains unchanged. If, therefore, its rates were reasonable prior to July 1, 1898, the addition of the amount of the stamp tax after that date cannot make them unreasonable. If the appellant's contention were to prevail, the express company would in effect be compelled to accept twenty-four cents as a reasonable rate for a service for which twenty-five cents had previously been conceded to be reasonable.

Some criticism has been made upon the method adopted by the express company of increasing its charges; and it has been said that, assuming that the tax is intended to be levied on the company and the company desired to increase the revenue from its business in order to meet the tax, it should have made a general readjustment of all its rates, and not add one cent to each, thus increasing a ten-cent rate ten per cent., while it increases a rate of one dollar only one per cent. In other words, there seems to be some notion that the express company should have determined accurately what the tax was going to amount

to, and then should have distributed the whole expense on a percentage basis among all its rates. If such a course were proper, its impracticability is apparent; but it is evident that the method adopted by the company is the method contemplated by Congress and the only just course which could have been pursued. Congress has imposed a tax of one cent upon each transaction of shipment. The express company has no right to change the law so as to impose less than one cent upon some shipments and more than one cent upon others. This would entirely negative the intention of Congress that the burden should be equally distributed, for it would result in some shippers paying more and others less than one cent. Besides it is not uncommon for stamp taxes to be imposed without regard to any percentage of value. For example, bank checks require the same stamp, no matter what may be the amount of the check.

The company's course is approved by the language of this court in *Case of The State Freight Tax*, 15 Wall. 232, 274. In that case, the Act imposing a tax on freight expressly authorized companies whose right to tolls was limited by law to add the tax to the amount of their tolls, but did not extend the privilege to companies whose charges for carriage were not thus limited. In speaking of the latter class, the court said at page 274:

> "It required no such grant to companies which not only own their roadway but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. *They can, therefore, add the tax to the charge for transportation without further authority.*"

The appellant seeks to escape from this difficulty by insisting, that while the new Act purports to be merely an Act to provide revenue, it is really an Act intended by Congress as an Act among other things to regulate or

reduce the rates of express companies. If this were the fact, the Act would be beyond the powers of Congress; for it levies a tax upon all receipts, whether for interstate or intra-state shipments, and thus would attempt to regulate the rates, not only for interstate, but for intra-state, commerce. Such legislation, *quoad* commerce within the states, would doubtless be unconstitutional. (*Gibbons* v. *Ogden*, 9 Wheat. 1, 195; *The Daniel Ball*, 10 Wall, 557, 564; *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 557, 564). The court will not readily adopt such an interpretation of the Act, when, if construed as an Act to provide revenue merely, it would be entirely valid.

As this court said in *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59:

> "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

The appellant cannot succeed unless it be established that the common-law right of the carrier to freedom of contract has been abrogated by the act. No prohibition in terms is found in the Act itself; but the appellant argues that it must be inferred. A common-law right cannot thus be taken away by implication or inference. It requires a distinct and positive legislative enactment to take away or alter legal rights. In *Arthur* v. *Bokenham*, 11 Mod. 148, 150, the court said:

> "Statutes are not presumed to make any alteration in the common law, further or otherwise than the act does expressly declare."

In *United States* v. *Fisher*, 2 Cranch, 358, 390, it was said by MARSHALL, C. J.:

> "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is

> departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects,"

In *Shaw* v. *Railroad Co.*, 101 U. S. 557, 565, the court said:

> "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."

Also *Brown* v. *Barry*, 3 Dallas, 365; *Douglass* v. *Lewis*, 131 U. S. 75, 85.

It is thus apparent that even had the Act in terms imposed the tax exclusively upon the express company, the company might still lawfully relieve itself of the expense by requiring reimbursement from its shippers as a condition of accepting goods for transportation. Whether this be done by exacting a charge made up of two items, or of a single item, is immaterial.

V.

Conclusion.

The answer to the first question certified should be that the War Revenue Act does not impose the tax upon the carrier exclusively, but leaves it to be paid indifferently by either the carrier or the shipper.

The answer to the second question should be in the negative.

Washington, D. C., October Term, 1899.

Charles Steele,
William D. Guthrie,
Theodore S. Beecher,
Of counsel for appellee.

No. 248.

Brf. of Steele, Guthrie & Beecher, for

STAMP TAX ON EXPRESS RECEIPTS.

WAR REVENUE LAW OF JUNE 13, 1898.

Appellee

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

Filed Nov. 18, 1899

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 248.

WILLIAM CRAWFORD,
Appellant,

vs.

WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company.

BRIEF FOR APPELLEE ON QUESTION OF JURISDICTION.

CHARLES STEELE,
WILLIAM D. GUTHRIE,
THEODORE S. BEECHER,
Of counsel for appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

NO. 248.

WILLIAM CRAWFORD,
Appellant,

vs.

WILLIAM L. HUBBELL, as Treasurer of The Adams Express Company.

BRIEF FOR DEFENDANT.

AS TO THE JURISDICTION OF THE COURT.

This cause, originally commenced in the state court, was removed to the Circuit Court of the United States for the Southern District of New York upon the petition of the defendant upon the grounds hereinafter stated (Removal Papers, p. 1 *et seq.*). A motion to remand was made by the complainant, which was denied (Removal Papers, pp. 31–32), and the cause having been heard on the merits, a decree was entered dismissing the bill. From this decree the complainant appealed to the Circuit Court of Appeals for the Second Circuit, and by that court two questions of law were certified to this court for instructions. Effort was made by counsel in the Circuit Court of Appeals to have the entire record of the cause, including the proceedings on removal, sent up to this court with the certificate; but the effort was unsuccessful. Application was then made to this court for the writ of *certiorari* to bring up the whole record for review, which application was denied. It was thus not due to neglect of counsel that all the proceedings in the cause were not before the court upon the oral argument.

Inasmuch as the attempt below to have all the papers, including the removal papers, certified to this court was unsuccessful, and the subsequent application to this court to have the entire record sent up was denied, it was assumed by counsel that the question of jurisdiction, like the other questions in the case, would be reserved until final hearing of the whole case upon a complete record, and that upon the present hearing, the court would confine its attention solely to the questions certified by the Circuit Court of Appeals for decision. The brief was accordingly confined to the discussion of the questions certified.

It appears from the removal papers that removal was sought by the defendant on three grounds: (1) That the controversy is between citizens of different states; (2) that the cause is one arising under the Constitution and laws of the United States; (3) that the cause arises under the laws of the United States providing internal revenue.

As to the first two grounds, it was insisted that the requisite jurisdictional amount was involved. As to the latter ground, it was urged, in addition, that the right to removal existed independently of the amount involved.

No question can arise but that the controversy was between citizens of different states, for, at the time of the commencement of the suit, the plaintiff was a citizen and resident of the State of New York, and the defendant was a citizen and resident of the State of Connecticut (Removal Papers, p. 1, fol. 3). The circumstance that the defendant was sued in a representative capacity is immaterial (*Whitman* v. *Hubbell*, 30 Fed. Rep. 81; *Baltimore & Ohio R. R. Co.* v. *Adams Express Co.*, 22 Fed. Rep. 404). So it is equally clear that the question is one arising under the Constitution and laws of the United States, for it is

apparent that the plaintiff must succeed or fail according as one or another construction is put upon the War Revenue Act by the court. In *Starin* v. *New York*, 115 U. S. 248, the court said, at page 257:

> "The character of a case is determined by the questions involved. *Osborn* v. *Bank of United States*, 9 Wheat. 737, 824. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not."

The only questions, therefore, that require consideration are (1) as to the jurisdictional amount involved; and (2) as to whether, in a cause arising under a law providing internal revenue (R. S. sec. 629, subdiv. 4), the amount involved is immaterial.

I.

As to the jurisdictional amount.

The suit is for an injunction restraining the defendant from requiring the plaintiff to pay the stamp tax imposed by the War Revenue Act upon the shipment of express packages. While the tax in the case of the particular shipment which was refused, amounts to but one cent, the relief asked is not merely in respect of that package, but of all packages which the plaintiff will have to ship in the future (Record, p. 7). It is alleged in the bill that the average number of express shipments made by the plaintiff over all the express lines leaving the City of New York is not less than 2,500 per month, and that of these not less than 700 per month have been made over the lines of the Adams Company. The plaintiff further alleges that his business is growing and extending, and that the aggregate number of shipments which he will be

required to make in the regular and ordinary course of his business in the future over the lines of the Adams Company will not be less than it has been in the past. The amount of the tax which the plaintiff would have to pay on Adams Express shipments would thus be at least seven dollars a month or eighty-four dollars a year. The petition for removal alleges that the matter or amount in dispute exceeds, exclusive of interest and costs, the sum and value of $5,000 (Removal Papers, p. 1, fol. 3), and that the number of express packages ordinarily shipped over the Adams Company's lines exceeds 28,000,000 of such packages per year, upon which the tax would amount to more than $280,000 per year. The petition further alleges that the matter or amount in dispute is the value of the right claimed by the Express Company to require the plaintiff and other shippers to provide or pay for the revenue tax; and that the value of such right is more than $280,000 per year (Removal Papers, p. 3).

Upon these allegations, it would seem quite clear that much more than the jurisdictional amount is here involved. If the amount were limited to the mere money value of the plaintiff's right, it would amount to at least $84 a year, and thus in a few years would reach the jurisdictional amount. But in a suit for injunction, it is proper to consider, not only the value of the plaintiff's right, but the value to the defendant of the exercise by him of the right sought to be enjoined; and this not merely as regards the plaintiff, but generally. This right, we have seen, would have a money value of at least $280,000 a year.

The question will be considered, then, from both aspects.

A.

AS TO THE MONEY VALUE OF THE PLAINTIFF'S RIGHT.

As pointed out above, the relief sought is not merely with regard to the particular shipment tendered by the plaintiff and refused by the defendant, but extends to all the business of the plaintiff in the future. There is no limitation as to time, but injunctive protection is asked so long as the law shall remain in existence. The complaint avers that the plaintiff's business is growing and extending, and that the aggregate amount of his shipments in the future will not be less than they have been in the past (Record, p. 4). It cannot be assumed that the law will be repealed; so that we must presume that in the ordinary course of events the business of the plaintiff will continue, and that the burden from which he seeks relief will not be removed or lessened. He will, therefore, be under a continuing expense each year which must ultimately far exceed the jurisdictional amount. This is sufficient for the jurisdiction of the court; for it will not be held that the plaintiff can have no relief until he has suffered damages in a sum greater than the jurisdictional amount.

In *Scott* v. *Donald*, 165 U. S. 107, 115, where the suit was for an injunction to restrain continued and repeated acts of trespass in seizing the plaintiff's property, the court said:

> "Nor can it be reasonably claimed that the plaintiff must postpone his application to the Circuit Court, as a court of equity, until his property to an amount exceeding in value two thousand dollars has been actually seized and confiscated, and when the preventive remedy by injunction would be of no avail."

In *United States* v. *Freight Association*, 166 U. S. 290, a statute enabling an appeal to be taken to this court "where the *matter in controversy* shall exceed $1,000" was held applicable to an appeal from a decree enjoining

action under an agreement among railroad corporations to establish and maintain rates. The court said (p. 311):

> "A reduction of the rates by only the fractional part of one per centum would, in the aggregate, amount to over a thousand dollars in a very few days. This is sufficient to give the court jurisdiction on appeal."

In *Smith* v. *Whitney*, 116 U. S. 167, on an application for a writ of prohibition to try an officer on charges, the court overruled the objection that it had no appellate jurisdiction, and held that the matter in dispute was whether the officer was subject to a prosecution that might end in a sentence depriving him of salary, which in less than *two years* would exceed the jurisdictional amount. See, also, *Columbian Insurance Company* v. *Wheelright et al.*, 7 Wheat. 534; *United States* v. *Addison*, 22 How. 174.

In the Circuit Courts, it has long been the settled law that the jurisdiction in a suit for injunction is to be determined by the value of the right to be protected, or the extent of the injury to be prevented by the injunction, and not alone by the amount presently involved.

In *American Fertilizing Co.* v. *Board of Agriculture*, 43 Fed. Rep. 609, the suit was to enjoin the Board of Agriculture of North Carolina from enforcing the state tax on fertilizers against the plaintiff, a corporation engaged in the manufacture and sale of fertilizers. The tax imposed on the plaintiff by the terms of the statute was only $500, but in answer to the objection that the amount in controversy was only $500, the amount of the tax imposed, the court said (p. 610):

> "The tax is an annual one, and the value to plaintiff of the injunction cannot be measured by the tax of a single year."

So in *Western Union Tel. Co.* v. *City Council*, 56 Fed. Rep. 419, where also the suit was to enjoin collection of

a license tax of $500 per annum, the court sustained its jurisdiction, saying (p. 420):

> "An injunction in a case like this must be of much greater value to the complainant than the sum immediately demanded."

In *Humes* v. *City of Ft. Smith*, 93 Fed. Rep. 857, where the suit was to enjoin the enforcement of an ordinance imposing a license tax of $75 a month, the court said (p. 862):

> "The defendant insists that the court is without jurisdiction, because the amount in controversy does not exceed the sum of $2,000; that is to say, that the amount which the complainant would have to pay for license to conduct his business does not amount to that sum. Jurisdiction is not determined in that way. Jurisdiction is determined by the value of the right to be protected, or the extent of the injury to be prevented, by the injunction."

See, also, *State* v. *Kansas & T. Coal Co.*, 96 Fed. Rep. 353; *Hennessy* v. *Herrmann*, 89 Fed. Rep. 669; *Symonds* v. *Greene*, 28 Fed. Rep. 834.

In *Texas & Pacific Railway Co.* v. *Kuteman*, 13 U. S. App. 99, in a suit by a railroad company to enjoin the institution of a multiplicity of suits to recover back amounts paid in excess of what might lawfully be charged for transportation, the court said in sustaining the jurisdiction of the court (p. 107):

> "The complainant also avers * * that the complainant's right to establish and maintain such rates is a valuable one, and of the value of more than ten thousand dollars * * *An injunction may be of much greater value to the complainant than the amount in controversy in cases of dispute which have already arisen.*"

In *Nashville, C. & St. L. Ry. Co.* v. *M'Connell*, 82 Fed. Rep. 65, where the suit was for an injunction against the wrongful use of special contract railroad tickets, it was objected that the suit was substantially upon the ticket contract; that the right of action was

separate upon each ticket, and that such rights or claims could not be joined for the purpose of making up the jurisdictional amount. The court overruled this objection, saying (p. 74):

> "The loss *likely to result in the future* enters into the value of the object of the suit for preventive relief. * * * All damages suffered and *likely to be suffered* are estimated."

It is to be observed that this case is quite different from *Washington &c. Railroad* v. *Dis't of Columbia*, 146 U. S. 227, and similar cases, where the relief asked was only against certain *specified* wrongs which *had already occurred* and which together did not aggregate in value the jurisdictional amount. Here the relief prayed for, is as to the *future* as well as the past. It is to protect the plaintiff's right for all time, and not merely in the specific instance which has already occurred.

Thus, in the Georgetown R. R. Co. case cited above, the prayer for relief was directed only against certain particular taxes which had been already levied, and an injunction was asked to restrain the prosecution of pending actions to *enforce those taxes* or the institution of any other actions to *enforce the same taxes*. The relief asked was thus confined to certain specified taxes already assessed, and the Court said (p. 232):

> "The matter in dispute in its relation to jurisdiction is the particular taxes attacked, and unaccrued or unspecified taxes cannot be included, upon conjecture, to make up the requisite amount."

To the same class belong the cases of *Clay Center* v. *Farmers' Loan &c. Co.*, 145 U. S. 224; *New England Mortgage Co.* v. *Gay*, 145 U. S. 123; *Gibson* v. *Shufeldt*, 122 U. S. 27.

So in the case at bar, if the relief demanded had been simply against refusing to accept, without payment of the

tax, the package that had been actually tendered, it might perhaps be plausibly objected that this court could not take into consideration future shipments. But the complaint expressly demands judgment that the company be required "to accept and receive for forwarding and transportation and to forward and transport for the plaintiff *any package or packages* of the kind and character they are accustomed to forward and transport," &c. (Record, p. 7) thus extending the relief asked, beyond the particular instance which had occurred, and embracing all the plaintiff's shipments in the future.

The distinction here suggested was recognized in *Citizens' Bank* v. *Cannon*, 164 U. S. 319, 322, where, in a suit to enjoin the enforcement of payment of taxes for specific years past, the court said:

> "It is argued that jurisdiction may be seen in the averment of the bill that the value of the exemption of the bank's property during the continuance of its charter exceeds two thousand dollars for each parish. But the answer to this is, that this is not a suit to exempt property from taxation permanently. The purpose of the bill is to restrain certain tax assessors and tax collectors from collecting taxes for specific years."

The court thus recognized the distinction between a suit involving "taxes for specific years" and a "suit to exempt property from taxation permanently." Had the suit then been of the latter class, the jurisdiction would evidently have been sustained.

B.

AS TO THE VALUE OF THE DEFENDANT'S RIGHT.

But, as already intimated, we are not in a case of this kind confined to a consideration of the benefit that would be derived by the plaintiff from the relief sought. We may look as well at the value to the defendant of the right whose exercise is sought to be enjoined. Where, for

instance, the threatened injury consists in the use by the defendant of specific property, the value of such property rather than the injury produced by the use of such property has been regarded as the matter in dispute. Thus in *Mississippi and Missouri Railroad Company* v. *Ward*, 2 Black 485, where the suit was to abate a railroad bridge as a nuisance, specially injurious to the plaintiff as a proprietor of steamboats, the court said (p. 492):

> "The want of a sufficient amount of damage having been sustained to give the Federal Courts jurisdiction, will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern."

This decision was, in *Whitman* v. *Hubbell*, 30 Fed. Rep. 81, applied to the case of a suit to restrain the maintenance of an *awning* to the injury of the plaintiff, and the court said:

> "The matter in dispute is the value of the right to maintain the awning, not the amount of damage done by it to the plaintiff."

So in *Rainey* v. *Herbert*, 3 U. S. App. 592, 600, 628, the same rule was applied to the case of a suit to restrain the erection of *coke ovens*. There the court said at page 600:

> "But the defendant, in an affidavit on file in the cause, has stated that the continuance of the injunction would damage him 'many thousands of dollars.' Now, in *The Mississippi and Missouri Railroad Company* v. *Ward*, 2 Black, 485, 492, which was a suit in equity to abate a nuisance, it was ruled that the want of a sufficient amount of damages suffered by the plaintiff to give the court jurisdiction would not defeat the suit if the value of the object to be attained, namely, the removal of the nuisance, was up to the jurisdictional sum, and in *Market Company* v. *Hoffman*, 101 U. S. 112, the value of the right, the exercise of which was enjoined, was held to be a test of jurisdiction."

Similarly in *Market Company* v. *Hoffman*, 101 U. S. 112, where the suit was to enjoin the proprietor of a market from selling stalls in such market occupied by the com-

plainants, and to establish the right of the complainants to continued occupancy, the amount of the benefit of which the decree in favor of the plaintiff deprived the defendants, was considered for the purpose of determining whether the amount in controversy was sufficient to give this court jurisdiction on appeal. The court said at page 113:

> "The first question to be determined is whether the amount in controversy is sufficient to give us jurisdiction of the appeal. Upon this we have no doubt. While it may be true, that if Hoffman was the sole complainant, the amount in controversy would be insufficient to justify an appeal either by him or the company, the case is one of two hundred and six complainants suing jointly, the decree is a single one in favor of them all, and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable. It is averred under oath in the pleadings that the sale which the company proposed to make, and the court below enjoined, would have realized to the company more than $60,000. Of this benefit the decree deprives them."

In *Stinson* v. *Dousman*, 20 How. 461, 467, on writ of error to a state court in an action to recover $481 as rent, a sum less than the jurisdictional amount of $1,000, it appeared that the agreement to pay such rent was contained in a contract for the sale of the land, which provided that, in case of failure of the vendee to perform the covenants on his part, the vendor could declare the contract void, and hold the vendee liable for rent, and the court said:

> "The subject of the suit is not merely the amount of rent claimed, but the title of the respective parties to the land under the contract. The contract shows that the matter in dispute was valued by the parties at eight thousand dollars. (*Bennett* v. *Butterworth*, 8 How. 124.) We think this court has jurisdiction."

The court will bear in mind that the express company is a common carrier and as such is bound by law to treat all its patrons alike. An adverse decision in this case,

therefore, would directly determine its right not only as against the plaintiff, but as against all its other shippers. The company could not litigate the question anew. The matter in dispute, therefore, is the company's right to exact the tax, not alone from the plaintiff, but from all its shippers. This right is of the value of at least $280,000 a year. Were the business not thus affected with a public interest, it might well be doubted whether the court could consider the effect of the injunction as between the company and customers other than the plaintiff; but where the question is, as here, a public one, we submit that the defendant's right, not only as against the plaintiff, but against the public as well, is the real matter in dispute.

II.

AS TO THE JURISDICTION IN A CAUSE ARISING UNDER A LAW PROVIDING INTERNAL REVENUE INDEPENDENTLY OF THE AMOUNT INVOLVED.

In the court below the jurisdiction was sustained on the ground that the case was one arising under a law providing internal revenue. The opinion of the court (89 Fed. Rep. 1) did not state, however, that this conclusion was reached independently of the amount involved; and in the subsequent case of *Johnson* v. *Wells, Fargo & Co.*, 91 Fed. Rep. 1, the court there distinguished the decision in the case at bar on the ground that it was evident that here the amount involved was over $2,000, and, therefore, it would be assumed that the court had sustained the jurisdiction on the ground, not only that the question arose under a revenue law, but that the amount involved was over $2,000; and in the *Wells-Fargo* case the court reached the conclusion that there was no right to removal in a case arising under the revenue laws, unless the necessary jurisdictional amount was involved.

It is submitted, however, that the decision in the *Wells-Fargo* case is not sound, and that the correct view is that the circuit courts still have jurisdiction, independently of the amount involved, in a cause arising under a law providing internal revenue, and that such a cause, if begun in the state court, may be removed to the Federal courts.

We should undoubtedly expect to find that Congress had conferred upon the Federal courts jurisdiction to determine all questions arising under the Federal revenue laws. Indeed, it might well be doubted whether any other than a Federal court could have original jurisdiction in such a case. The jurisdiction would seem to differ little in principle from that in the case of admiralty and patent cases, where the Federal jurisdiction is exclusive. No adjudication has been found upon this point, however—probably because no suit was ever before brought in a state court to obtain a construction of a Federal internal revenue law.

By the fourth sub-division of Section 629 of the Revised Statutes of the United States the circuit courts were given original jurisdiction of "all causes arising under any law providing internal revenue, and of all causes arising under the postal laws." It will be observed that the jurisdiction under this sub-division does not depend upon the amount involved, but extends to all causes arising under any law providing internal revenue. It was at one time supposed that this sub-division had been repealed by the Act of March 3, 1875, or the Act of March 3, 1887, defining the jurisdiction of the circuit courts; but it is now well settled in the circuit courts that the fourth sub-division of Section 629 was not repealed, but is still operative.

In *Ames* v. *Hager*, 36 Fed. Rep. 129, it was held that although the first three subdivisions of section 629 had been repealed by the subsequent acts of 1875 and 1887, which covered the subject matter of such subdivisions, yet subdivision 4, the subject matter of which was not so covered, was not so repealed. The court said:

> "The subject-matter of the first three clauses is substantially the same as that of section 11 of the act of 1789, and embraces the *general* jurisdiction of the court. That of the fourth clause (claim) is covered by, and taken from, the act of 1833 (4 St. 632,) and the subsequent clauses from various other statutes conferring *special* jurisdiction. Before the consolidation in the Revised Statutes all these provisions stood and were in force together, and, as to many of them, at least, there was no limitation as to the amount necessary to confer jurisdiction. In the Revised Statutes, they were collected into one section, a clause having been given to each class. The language of the statute was changed, in order to collate and condense, without intending to change the law. In the acts of 1875 and 1887, congress returns substantially to the language of the act of 1789, conferring *general* jurisdiction, and, doing so, is it not reasonable to suppose, that by this return to the language of that act it was intended to embrace the subject-matter only of that act, with respect to limiting the jurisdiction by the amount in dispute? If not so intended, then no suit could be brought under the act of 1875, under either of the clauses subsequent to the third, including suits upon patents for inventions, unless the amount in dispute exceeds $500, and none can now be brought under the act of 1887, unless the amount involved exceeds $2,000."

So in *United States* v. *Shaw*, 39 Fed. Rep. 433, 435, it was held that the act of 1887 "could not, therefore, be held to repeal by implication the jurisdiction over the special subject-matter provided for by subdivision 4 of the same section". And in *Commissioners of the Sinking Fund of Louisville* v. *Buckner*, 48 Fed. Rep. 533, subdivision 4, was recognized as still in force.

By the second section of the Act of March 3, 1875, a defendant was permitted to litigate in the circuit court by

a removal, any suit which he could have litigated there if it had been originally commenced in that court. In other words, any suit of which circuit courts had original jurisdiction could be removed to those courts if begun in a state court. In the second section of the amendatory Act of March 3, 1887, however, it is provided that those suits are removable to the United States Circuit Court of which the circuit courts are given jurisdiction by the *first section of the act*. Although the Act of 1887 was undoubtedly intended to abridge the jurisdiction of the circuit courts, it does not seem to have contemplated any further limitation of the right of removal than was put upon the jurisdiction.

This view is supported by the case of *Vinal* v. *Continental Const. & Imp. Co.*, 34 Fed. Rep. 228. There the court said, at pp. 228–9, speaking of the Act of March 3, 1887:

> "Under the second section of that act any suit of a civil nature is removable by the defendant of which the circuit courts are given jurisdiction by the first section, and by the first section the circuit courts are given jurisdiction of controversies between citizens of different states in which the matter in dispute is of the requisite sum or value. The act is a slovenly piece of patch-work put upon the act of March 3, 1875; but, reading the original and amendatory acts side by side to discover what has been inserted in and what left out of the original act, the meaning of the changes and their effect seem tolerably plain. The first section of the amendatory act, like the first section of the original act, relates exclusively to the original jurisdiction of the circuit court; and the second section of the amendatory act, like the second section of the original act, relates exclusively to the jurisdiction which may be resorted to by removal. It would seem to be the reasonable meaning of the second section in the amendatory act, like the second section of the original act, to permit a defendant to litigate in the circuit court by a removal, any suit which he could litigate there if it was originally commenced in a circuit court."

It is true that in this decision the court was passing only upon the meaning of the word "jurisdiction," and held that it must be construed to refer to subject-matter merely, and not to personal jurisdiction. The language, however, is broad enough to cover any suit which could have been originally commenced in a circuit court; and it would seem fair to hold that if the circuit courts retain original jurisdiction of revenue cases irrespective of the amount involved, notwithstanding section 1 of the act of 1887, the right to remove such cases should remain similarly unlimited.

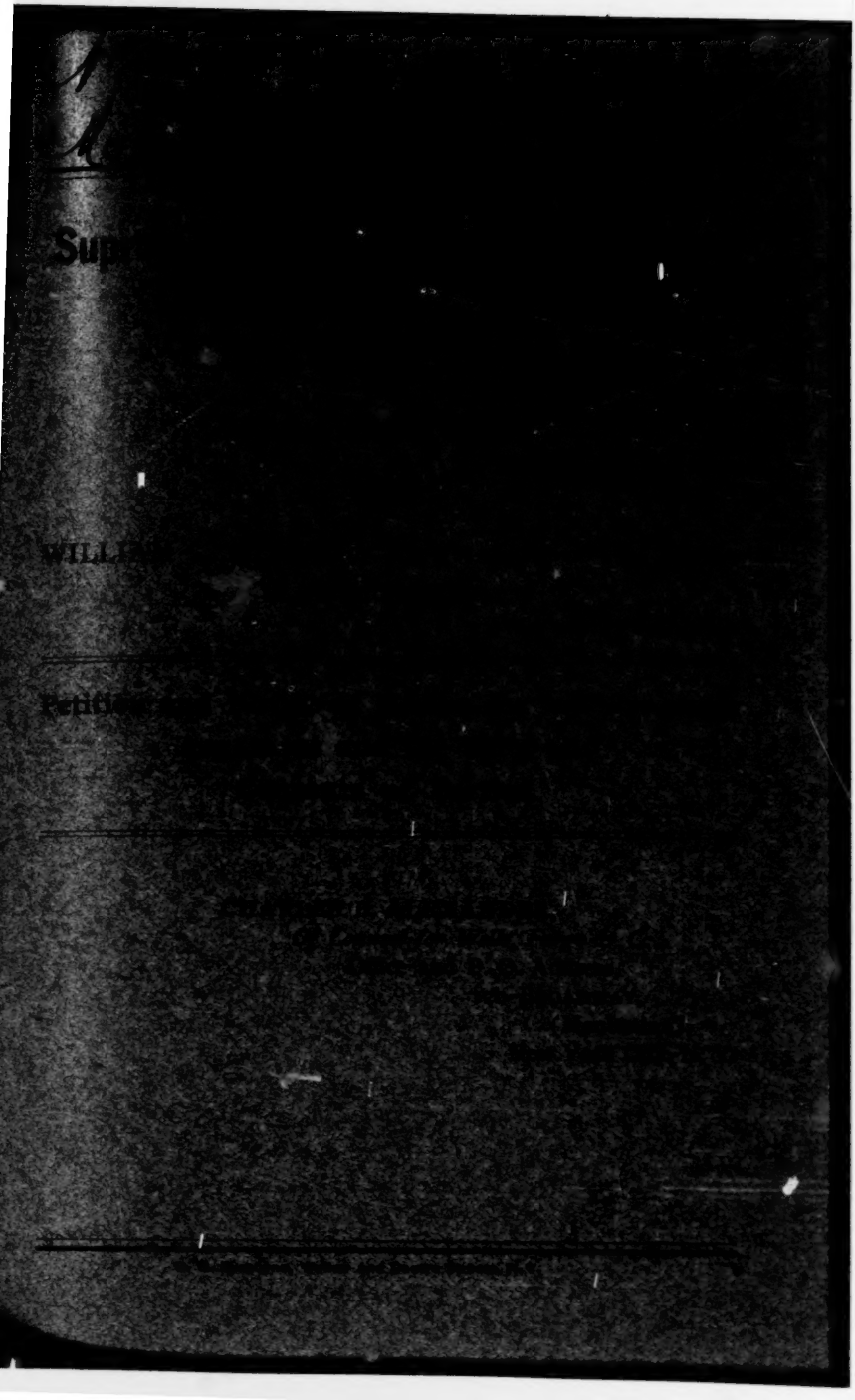
Such a construction would certainly be reasonable, and it would avoid the anomalous conclusion that although original jurisdiction is granted to the circuit courts in cases arising under the revenue laws, nevertheless such jurisdiction might be defeated by commencing such a suit in the state court, and a final and authoritative decision as to the construction of a Federal revenue law might thus be rendered by a state tribunal.

Conclusion.

For the considerations above set forth we submit that the cause was properly removed to the United States Circuit Court, and that the jurisdiction should be sustained.

Washington, D. C., October Term, 1899.

Charles Steele,
William D. Guthrie,
Theodore S. Beecher,
Of counsel for defendant.



In the Supreme Court of the United States

WILLIAM CRAWFORD,
Plaintiff and Appellant,

AGAINST

WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company,
Defendant and Appellee.

Term No. 248.

SIRS—Please take notice, that on the opening of Court on the 23d day of October next, at 12 o'clock noon, at the Capitol in the City of Washington, I will apply to the Court on behalf of Wells, Fargo & Company, a corporation, upon the annexed petition and consent and upon the record in this cause, for leave to submit a brief and be orally heard on the argument thereof.

Dated New York, October 13th, 1899.

CHARLES B. ALEXANDER,
Of Counsel for Wells, Fargo & Company,
Office and Post-office address,
No. 120 Broadway,
New York,
N. Y.

To JAMES B. DILL, ESQ.,
Counsel for Plaintiff and Appellant.
MESSRS. DILL, SEYMOUR & KELLOGG,
Attorneys for Appellant.
CHARLES STEELE, ESQ.,
Of Counsel for Defendant and Appellee.
MESSRS. SEWARD, GUTHRIE & STEELE,
Attorneys for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

WILLIAM CRAWFORD, Plaintiff and Appellant, AGAINST WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company, Defendant and Appellee.	Term No. 248.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of Wells, Fargo & Company respectfully shows:

That petitioner is a corporation duly incorporated under the laws of the State of Colorado.

That this cause comes here on a certificate from the United States Circuit Court of Appeals for the Second Circuit, and the questions certified to the Court are as follows:

1. Does the War Revenue Act of June 13, 1898, impose upon the carrier exclusively the tax represented by the stamp to be affixed to each bill of lading, manifest, or other evidence of receipt required to be issued to each shipper of goods accepted by the carrier for transportation, or does it impose the tax merely upon the transaction of shipment, leaving it to be paid indifferently by either party thereto?

2. If the War Revenue Act of June 13, 1898, does impose such tax exclusively upon the carrier, does it preclude the carrier, who is by such act required to issue to each shipper a bill of lading, mani-

fest or other evidence of receipt, from relieving itself of the expense of affixing and canceling the stamp required to be attached to such bill of lading, manifest or other evidence of receipt?

That the appellee in this case is not a corporation; that petitioner is deeply interested in the result of this appeal, having been already sued on questions of a similar character in the lower courts and numerous other suits being threatened against it.

In the brief of the appellant in the court below phrases like the following were used: "The carrying business of the country is in the hands of gigantic corporations and associations enjoying public franchises of the greatest value," and other similar phrases, and the inference was sought to be raised that for this reason the act should be construed against them. One answer which it is in the power of the appellee to make to such statement is that it is not a "corporation" and it is not "enjoying public franchises."

Petitioner has been advised by Charles B. Alexander, Esq., its counsel, that it is important that it should be urged on the Court that the fact that some of the express companies are public corporations and enjoy public franchises is not an argument which can be effectively used to pursuade the Court to construe the act in favor of the appellant; but petitioner is advised by its said counsel and believes that the appellee in this case, not being a corporation, and not enjoying public franchises, has no interest to make an argument in opposition to the view expressed by the appellant, and petitioner desires that that argument be made in this cause on its behalf and in the interest of those express companies which are corporations.

A brief has been prepared in petitioner's behalf, but petitioner is most desirous that a short oral argument be made on its behalf on the hearing of this cause. It is informed that the argument which will be addressed to the Court by the learned counsel for the appellee will be short, and that the whole

argument, including the argument which petitioner wishes to be addressed to the Court, will not exceed the ordinary time consumed in the hearing of an appeal before this Court. That, although the question is a very important one, it is a narrow one; that the printed certificate is only fifteen pages in length. Petitioner is informed by the solicitors for the appellee that only one counsel will appear for the appellee. That the questions now to be presented are questions which interest many thousands of citizens, not only the members of unincorporated express companies, but stockholders in express companies, and the great body of persons who are dealers with express companies.

Petitioner, therefore, respectfully prays that it may be permitted to file a brief and that an oral argument may be made on its behalf in this Court.

And your petitioner will ever pray, &c.

WELLS, FARGO & COMPANY,
Petitioner,
By CHARLES B. ALEXANDER,
Counsel.

SOUTHERN DISTRICT OF NEW YORK, }
County of New York, } ss.:

CHARLES B. ALEXANDER, being duly sworn, says that he is of counsel for Wells, Fargo & Company; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

CHARLES B. ALEXANDER.

Sworn to before me this 13th }
day of October, 1899. }

WILLIAM C. PRIME,
Notary Public,
Westchester County.
Certificate filed in N. Y. County.

IN THE SUPREME COURT OF THE UNITED STATES.

WILLIAM CRAWFORD, Plaintiff, AGAINST WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company, Defendant.	Term No. 248.

We do hereby consent that Wells, Fargo & Company be permitted to file a brief, and that Mr. Charles B. Alexander be permitted to make an argument on the side of the appellee in this cause.

Dated New York, October 9th, 1899.

JAMES B. DILL,
Counsel for William Crawford, Plaintiff.

IN THE SUPREME COURT OF THE UNITED STATES.

WILLIAM CRAWFORD, Plaintiff, AGAINST WILLIAM L. HUBBELL, as Treasurer of The Adams Express Company, Defendant.	Term No. 248.

We do hereby consent that Wells, Fargo & Company be permitted to file a brief, and that Mr. Charles B. Alexander be permitted to make an argument in this cause.

Dated New York, October 9th, 1899.

CHARLES STEELE,
Of Counsel for Defendant.

FILED
OCT 9 1899
JAMES H. McKENNEY,
Clerk.

No. 248.

Motion to postpone.

Filed Oct. 9, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 248.

WILLIAM CRAWFORD,
Appellant,

vs.

WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company.

MOTION TO POSTPONE ARGUMENT.

CHARLES STEELE,
Of Counsel for Respondent.

WASHINGTON, October 9, 1899.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM.

No. 248.

WILLIAM CRAWFORD, Appellant, AGAINST WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company.	Notice of Motion.

Notice is hereby given that upon the affidavit of Charles Steele, Esq., verified the 6th day of October, 1899, and upon the record in the above-entitled suit, removed to this Court on a certificate from the United States Circuit Court of Appeals for the Second Circuit, and the order heretofore made setting down this case for hearing on the second Monday of the October Term, 1899, I shall, on Monday, the 9th day of October, 1899, at the opening of Court on that day, or as soon thereafter as counsel can be heard, submit to the Supreme Court of the United States, at the Capitol in the City of Washington, and argue a motion to set a later date for the argument of this case, which motion is attached hereto, and a copy of which is herewith served upon you.

CHARLES STEELE,
Of Counsel for Respondent.

To JAMES B. DILL, ESQ.,
Of Counsel for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 248.

WILLIAM CRAWFORD,
Appellant,

AGAINST

WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company.

Motion to set later date for argument.

Now comes William L. Hubbell, as treasurer of The Adams Express Company, the said respondent, by Charles Steele, his counsel, and upon the affidavit of Charles Steele, Esq., and the record in the above-entitled suit, removed to this Court on a certificate from the United States Circuit Court of Appeals for the Second Circuit, and the order heretofore made in said suit, setting the same down for hearing on the second Monday of the October Term, 1899, moves this Honorable Court that said case may be set down for hearing on a later day when the same can be argued before a full bench, and that the same may be heard on the day fixed for the hearing of the case of The American Express Company against Fred A. Maynard *et al.*, No. 220, October Term.

Dated October 9, 1899.

CHARLES STEELE,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM. No. 248.

WILLIAM CRAWFORD,
Appellant,

AGAINST

WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company.

Southern District of New York, } ss.:
COUNTY OF NEW YORK, }

CHARLES STEELE, being duly sworn, deposes and says that he is of counsel for the respondent in the above entitled action, and is fully conversant with the facts of said case. That on motion in this suit granted on the eleventh day of April, 1899, the second Monday of the October Term, 1899, was set for the hearing therein. This case presents substantially the same questions that are involved in the case of The American Express Company, respondent and plaintiff in error, against Fred A. Maynard, Attorney General of the State of Michigan on relation of George F. Moore *et al.*, No. 220, which was set down for hearing on the second Monday of the October Term, 1899, in order that both of said cases might be heard together. A motion is to be made on October 9th, 1899, to set the case of The American Express Company against Maynard down for hearing on a later date, in order that the important questions involved therein may be heard before a full bench. Both of these cases present for construction by this Court the section of the War Revenue Act of 1898 which imposes a tax upon express receipts. It is estimated the tax would amount annually to more than $1,600,000, and the question is one affecting all express companies and shippers in the United States. Deponent is informed by the Clerk of this Court that the Chief Justice and Mr. Justice BREWER will not be

present in Court at the time these cases are set for argument. It is important that this case shall be set for hearing at the same time with No. 220, above mentioned, and it is earnestly desired that both cases may be argued before a full Court.

CHARLES STEELE.

Sworn to before me this 6th day of October, 1899.

FELIX M. GERNSHEIM,
Notary Public,
New York County.

[SEAL.]

MR. JUSTICE WHITE delivered the opinion of the court.

The certificate and the questions which arise from it are as follows:

"This cause came before this court on February 2, 1899, upon an appeal taken by the complainant to review a decree of the Circuit Court, Southern District of New York, sitting in equity. Such decree dismissed the bill. As to a question of law arising upon said appeal this court desires the instruction of the Supreme Court for its proper decision.

"*Statement of Facts.*

"This suit is for an injunction to restrain the express company from refusing to accept express packages from complainant for transportation, except upon the condition that complainant either pay for or provide the war revenue stamp required to be affixed to each receipt in addition to its usual and ordinary charges for transportation as the same existed on and for a long time prior to July 1, 1898. The defendant company since July 1, 1898, has fixed rates of compensation which it offers to accept for services rendered by it, whereby, in addition to the amount of its charges as the same existed on and for a long time prior to July 1, 1898, it requires the shipper either to provide or pay for the cost of the stamp on the bill of lading or receipt required to be issued by the act of Congress of June 13, 1898, known as the 'War Revenue Act.' It has made known these charges to shippers, and particularly to complainant, and refuses to accept packages for transportation except upon payment thereof. The pleadings are annexed to this certificate.

"*Questions certified.*

"Upon the facts set forth, the questions of law concerning which this court desires the instruction of the Supreme Court for its proper decision are:

"(1) Does the War Revenue Act of June 13, 1898, impose upon the carrier exclusively the tax represented by the stamp to be affixed to each bill of lading, manifest, or other evidence of receipt required to be issued to each shipper of goods ac-

cepted by the carrier for transportation, or does it impose the tax merely upon the transaction of shipment, leaving it to be paid indifferently by either party thereto?

"(2) If the War Revenue Act of June 13, 1898, does impose such tax exclusively upon the carrier, does it preclude the carrier, who is by such act required to issue to each shipper a bill of lading, manifest, or other evidence of receipt, from relieving itself of the expense of affixing and cancelling the stamp required to be attached to such bill of lading, manifest, or other evidence of receipt?

"In accordance with the provisions of section 6 of the act of March 3, 1891, establishing Courts of Appeal, etc., the foregoing questions of law are by the Circuit Court of Appeals hereby certified to the Supreme Court."

The subject to which the certificate relates and the matter embraced in the questions submitted has been considered, and was passed on in an opinion this day announced in the case of the *American Express Company* v. *Fred. A. Maynard, Attorney General of the State of Michigan ex rel. George F. Moore et al.*, No. 220 of the docket of this term.

For the reasons given in the opinion in the case just referred to it is unnecessary to answer the first question submitted, and a negative answer to the second question is required.

And it is so ordered.

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CRAWFORD *v.* HUBBELL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 248. Argued November 8, 9, 1899. — Decided April 16, 1900.

The matter embraced in the questions submitted to this court has been considered, and was passed on in the opinion in *American Express Co.* v. *Michigan*, *ante*, p. 404, which is followed in this case.

THE case is stated in the opinion.

Mr. Frederick R. Kellogg and *Mr. Allan L. McDermott* for appellant. *Mr. James B. Dill* was on their brief.

Mr. Charles Steele and *Mr. Charles B. Alexander* for appellee. *Mr. William D. Guthrie* and *Mr. Theodore S. Beecher* were on their brief.